SCOTTISH LAW COMMISSION

MEMORANDUM No: 13

JURISDICTION IN DIVORCE

MEMORANDUM NO. 13

JURISDICTION IN DIVORCE

INDEX

	Para.Nos.	Page Nos
INTRODUCTION	1- 5	1- 4
PART I		
JURISDICTION	6-56	4-37
EXISTING GROUNDS OF JURIDISCTION IN DIVORCE	6-11	4- 6
OBJECTIVES OF DIVORCE JURISDICTION	12	6- 7
PRESENT LAW IN LIGHT OF OBJECTIVES	13-20	7-11
CURING THE DEFECTS OF THE PRESENT LAW	21-48	11-31
Application of Personal Law of Spouses	21-24	11-13
Tests of Jurisdiction	25	14
Nationality	26-29	14-16
Domicile	30-38	17-24
(1) General	30-32	17-19
(2) Domicile of married women	33-36	20-23
(3) Matrimonial domicile	37-38	23-24
Residence	39-47	24-30
Suggested Residence Test	48	31
JURISDICTION IN CROSS-ACTIONS	49	31-32
SUMMARY OF PROVISIONAL CONCLUSIONS	50 & 76	32 & 52
JURISDICTION IN JUDICIAL SEPARATION	51	33
JURISDICTION IN PETITIONS FOR DISSOLUTION OF MARRIAGE ON GROUND OF PRESUMED DEATH	52-56	34-37
PART II		
CONFLICTS OF JURISDICTION	57-75	37-51
GENERAL	57-60	37-41
PROPOSED GENERAL RULES	61-62	41-42
DUAL JURISDICTION OF COURTS IN U.K.	63	42-43
U.K. CONFLICT RULES	64-74	43-51
SUMMARY OF PROVISIONAL CONCLUSIONS IN PART II	75	51
PART III		
PROVISIONAL CONCLUSIONS IN PARTS I AND II EXPRESSED AS RULES	76	52-55
APPENDIX		
Articles 1-25 of Draft Hague Convention on the Recognition of Divorces and Legal Separations (October 1968).		56-65

This Memorandum is designed to elicit comments upon and criticism of the proposals which it contains.
It does not represent the concluded views of the Scottish Law Commission.

SCOTTISH LAW COMMISSION

JURISDICTION IN DIVORCE

INTRODUCTION

1. Item No 14 of our Second Programme, published on 14th May, 1968, requires us to proceed with a preliminary study of Family Law. The subject was included partly because the Law Commission had embarked upon its comprehensive examination and it seemed desirable that, where practicable, the study of Family Law in the English and Scottish systems should be coordinated. One of the topics within the general heading of Family Law selected for study by the Law Commission was jurisdiction in matrimonial causes and here it seemed particularly desirable that the two systems, which have hitherto applied very similar rules, should not diverge. Such divergence would not only seem anomalous to the general public but would enhance the risk of the parties seeking an inappropriate forum for divorce. This risk would be greatly increased if grounds for divorce in the two countries should in the future diverge more widely than they do at present. This divergence will occur on 1st January 1971, when the Divorce Reform Act 1969 takes effect, as corresponding changes to Scots Law are unlikely to be introduced at the same time. But we examine this branch of the law not merely because of the risk of divergence between the two systems but because the basis of the present rules of jurisdiction in both countries was recently called into question by the House of Lords in _Indyka_ v _Indyka_[1].

---

1. [1969] 1 A.C. 33, particularly the speech of Lord Reid at pp. 65-6.

2. For these reasons we have collaborated closely with the Law Commission in the study of this topic. From certain points of view we would have wished to prepare a Joint Paper with them and, indeed, were invited to do so. Having regard, however, to the separate history of the law in the two countries and to the existing differences in the rules and in their terminology, we concluded that it would facilitate the task of practitioners in both countries if separate papers were produced to express our common conclusions. We acknowledge, however, the debt we owe to the Law Commission for the extensive preliminary work carried on by them and for their full cooperation in all our joint deliberations which preceded the publication of our respective Papers.[1]

3. This Memorandum deals basically with jurisdiction in divorce, which is by far the most important type of matrimonial action. We exclude jurisdiction in actions of nullity and in actions of declarator of marriage, partly with a view to simplifying presentation of this paper but mainly because such actions raise different problems and it is not clear that the same jurisdictional criteria are relevant. We consider judicial separation because it may be utilised as an alternative remedy to divorce, but we discuss it separately in paragraph 51. We deal separately also, in paragraphs 52-56, with the question of jurisdiction in petitions for dissolution of marriage on the ground of the presumed death of a spouse, because the criteria of jurisdiction require modification in view of the fact that one of the spouses has disappeared.

4. We are concerned here with jurisdiction in divorce and not, directly at least, with the question of what substantive

---

1. Law Commission Published Working Paper, No. 28

rules of law should be applied by a court which possesses jurisdiction. But the two questions cannot be entirely dissociated. If jurisdiction is assumed only on the basis of the domicile of the husband, it is arguable that the court which is exercising jurisdiction, in applying its own law, is necessarily applying the personal law of the spouses, that law being the law of the husband's domicile. But the introduction of wider grounds of jurisdiction, such as the rule stated in section 2(1) of the Law reform (Miscellaneous Provisions) Act 1940 or, indeed, the rules which we advocate in this Memorandum, forcibly raise the question whether it is always appropriate for the court to apply its own law in actions of divorce. This question we consider in paragraphs 21-24.

5. Finally, in introducing this Memorandum we would be less than candid if we did not preface it with a cautionary remark. Our joint study of the basis of jurisdiction in divorce has led us to favour a widening rather than a narrowing of the existing grounds of jurisdiction. In particular, both Commissions recommend the addition of the habitual residence of either spouse for one year prior to the service of the summons and the domicile of the wife which, for this purpose only, is to be ascertained independently of that of her husband. The adoption of these recommendations would greatly increase the number of cases where the courts of England and Scotland might enjoy simultaneous jurisdiction, and increase, therefore, the risk of a choice of forum by a party motivated by differences between the two systems of substantive law. The risk of such "forum-shopping" would be considerably reduced by the acceptance of the conflict rules which, we propose, should be applied where the courts of the two countries enjoy simultaneous jurisdiction[1]. It would clearly be better, however, to minimise

1. See our analysis of this problem in paragraphs 57-75.

the advantages of "forum-shopping" within the United Kingdom by securing a general correspondence between the substantive grounds of divorce in the two countries.

Part I
JURISDICTION

EXISTING GROUNDS OF JURISDICTION IN DIVORCE

6. It may be helpful at the outset to summarise the existing grounds of jurisdiction in divorce in Scotland.

(a) Domicile of husband at date of action.

7. The Court of Session in Scotland has for long exercised jurisdiction in divorce primarily on the ground that the husband was domiciled in Scotland at the commencement of the action.[1] Since 1895, indeed, there has been a tendency to regard the domicile of the husband at the commencement of the action as the only proper ground of jurisdiction[2], although the special exceptions mentioned in the next two paragraphs are applied. Since, during the marriage, the wife's domicile is deemed to follow that of her husband, there is no question of the domicile of the wife being a ground of jurisdiction.

(b) Domicile of husband at date of matrimonial offence.

8. The rigour of the normal rule is to some extent mitigated by the practice of the Court of Session to exercise jurisdiction in actions of divorce for desertion at the instance of wives resident in Scotland against husbands who at the time of the desertion were domiciled in Scotland[3]. The equitable

---

1. In Scotland an action commences when the summons is served: in England, when the petition is filed.
2. Le Mesurier v. Le Mesurier [1895] A.C. 517.
3. See Mason v. Mason (1877) 14 S.L.R. 592; Pabst v. Pabst (1898) 6 S.L.T. 117; Mayberry v. Mayberry (1908) 15 S.L.T. 1016; Robertson v. Robertson, 1915, 2 S.L.T. 96 and 1916, 2 S.L.T. 95.

basis of this exception is that "the husband could not destroy the jurisdiction to entertain an action founded on desertion by the very act of desertion which constituted the ground of action"[1]. A similar exception was introduced into English law by section 13 of the Matrimonial Causes Act, 1937.

9. The Court of Session now exercises jurisdiction in an action by a wife for divorce on the ground of adultery, and probably also cruelty, committed by a husband while he was domiciled in Scotland, although he has subsequently abandoned that domicile[2]. This assumption of jurisdiction has been justified as follows: "after a cause of action has arisen in favour of a wife, a delinquent husband is not entitled (by changing his domicile) to subject his wife to the jurisdiction of the Court of another country"[3].

(c) Triennial residence of wife.

10. The Law Reform (Miscellaneous Provisions Act) 1949[4] provides by section 2(1) that the Court of Session shall have jurisdiction in proceedings by a wife for divorce "notwithstanding that the husband is not domiciled in Scotland if:

(a) the wife is resident in Scotland and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings; and

(b) the husband is not domiciled in any other part of the United Kingdom, or in the Channel Islands, or the Isle of Man".

---

1. Jack v. Jack (1862) 24 D. 467, per Lord Deas at p. 473.
2. Clark v. Clark, 1967 S.C. 296.
3. Ibid., per Lord Cameron at p. 320.
4. c.100

11. Two features of this Act call for comment. In the first place, "ordinary residence .... connotes residence in a place with some degree of continuity and apart from accidental or temporary absences"[1]. In the second place, the Act refers only to "proceedings by a wife for divorce" and makes no provision for the court to assume jurisdiction in a cross-action by the husband[2].

OBJECTIVES OF DIVORCE JURISDICTION.

12. The purpose of this Memorandum is to consider whether the existing rules of jurisdiction are satisfactory. We recognise that there will be different views on this question, but we trust that there will be little room for disagreement about the objectives which these rules should seek to secure. We suggest that a humane system of divorce jurisdiction should have at least the following objectives:

(1) That persons with real and substantial ties with a country should be able to have their matrimonial affairs adjusted there.

(2) That divorce should not be granted to persons without such ties. In particular, the rules should not be so wide as to tempt persons who have no substantial connections with a country to invoke the jurisdiction of its courts because of advantages its substantive law may seem to present to them. In other words, the rules should not be so wide as to encourage "forum-shopping".

---

1. Per Lord Cave in Levene v. I.R.C. [1927] A.C.217 at p.225; Hopkins v. Hopkins [1951] P.116, per Pilcher, J. at p.121. See also Land v. Land 1962 S.L.T. 316: cf Casey v. Casey, 1968 S.L.T. 56; Stransky v. Stransky [1954] P.428: and Lewis v. Lewis [1956] 1 W.L.R. 200.

2. Levett v. Levett & Smith [1957] P. 156; Russell v. Russell & Roebuck [1957] P. 375.

(3) That, as a matter of preference though not of necessity, rules of jurisdiction should be adopted tending to ensure that decrees pronounced in the exercise of that jurisdiction will be recognised in other countries and, particularly, in other countries with which the parties, or either of them, have ties. In other words, the rules should avoid, as far as possible, the creation of "limping marriages".

(4) That the criteria selected should be easily ascertainable and readily applied in practice.

(5) That the criteria should be chosen with a view to avoiding the creation of anomalies and hardship.

THE PRESENT LAW IN THE LIGHT OF THESE OBJECTIVES.

13. We recognise that this statement of objectives over-simplifies a number of issues. It might well be objected, that, while all would agree that jurisdiction should be exercised only when the parties have substantial ties with the country whose courts are seized, there cannot be unanimity in the classification of ties as real and substantial. This we concede, but the statement of these objectives, even in very general terms, does facilitate the evaluation of the merits and the demerits of the existing law. How does it measure up to these objectives?

14. Objective 1. We stated, as a first objective, that persons with a real and substantial connection with a country should be able to have their matrimonial affairs adjusted there. It is arguable that our present rules fail to meet this objective:-

(a) They fail to meet it, in the first place, because the law does not admit that a man may invoke the jurisdiction on the ground of long continued residence in Scotland.[1] He may found upon his own domicile in Scotland; but the present rules relating to the attribution of a domicile of choice stress the element of intention to reside in a place for an unlimited period. Where such intention is absent, residence, for whatever period, does not lead to the attribution of a domicile of choice. Yet we think, and we develop our reasons for so thinking in paragraphs 39-47, that settled residence for a period in a place satisfies any reasonable test of real and substantial connection.

(b) The present rules fail to meet our first objective in yet another way. If it is conceded - and we give reasons in paragraph 30 for suggesting that it should be conceded - that a man's domicile in a country is <u>generally</u> a connection sufficiently real and substantial as to warrant the assumption of jurisdiction in divorce, then a woman in the same external circumstances apart from her marriage should be able to invoke this jurisdiction. This argument we develop in paragraphs 34 and 35.

15. <u>Objective 2</u>. The second objective which, we suggest, should inform the rules of divorce jurisdiction is that persons with no substantial connections with Scotland should not be able to invoke the jurisdiction of its courts. The narrowness of our present rules of jurisdiction must make the cases rare in which neither party has a substantial connection with Scotland. A possible situation is where the only connection which either party has with Scotland is that the

---

1. See, in particular, the decision in <u>L.R.I.</u> v. <u>Ramsay</u> (<u>Ramsay</u> v. <u>Liverpool Royal Infirmary</u>), 1930 S.C. (H.L.) 83.

husband has retained a Scottish domicile of origin without ever having lived there. But such cases must be rare. The main objection to the present rules is not that they are inherently too wide, but that they are too narrow.

16. Objective 3. The third objective of rules of jurisdiction in divorce should be to secure that the criteria adopted gain acceptance in other countries. Here there are two main difficulties. The first arises from the fact that most countries outside the orbit of the common law use the concept of nationality both as the basis of jurisdiction in divorce and as the criterion by which a foreign assumption of jurisdiction will be recognised. This fact, however, causes less difficulty in practice than might be supposed, since a person's domicile and nationality normally coincide. There is a danger, nevertheless, that certain countries will not recognise Scottish divorces where the connection with Scotland is, in their view, insubstantial - as, for example, where jurisdiction is assumed on the basis of a revived domicile of origin without residence in Scotland.

17. A second difficulty arises from the fact that many legal systems outside the orbit of the common law make it a condition of recognition of a foreign divorce that the personal law of the spouses (usually the law of their nationality) should have been applied. The courts of these countries would be unlikely to recognise a divorce of one of their nationals granted by a Scottish court on the basis of Scots law under the jurisdiction conceded by section 2(1) of the Law Reform (Miscellaneous Provisions) Act 1940. This difficulty, again, may be less serious than would at first sight appear because in several of those countries it suffices that a ground of divorce exists in fact which is recognised by the personal law of the spouses.

18. <u>Objective 4.</u> We stated as fourth objective that the criteria for jurisdiction in divorce should be easily ascertainable and readily applied in practice. Unfortunately, the domicile of a person - central to our present rules of jurisdiction - is not always easily ascertainable because of the weight attached to the intention of the person concerned and, in consequence, of the diversity of the factors relevant to the ascertainment of a person's domicile. Proof of a person's intentions is not always easy. "Declarations as to intention", in the words of Lord Buckmaster, "are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the person to whom, the purposes for which, and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared intention"[1]. Where there is no evidence of expressed intentions, proof of any fact in a man's life may be relevant as throwing light on his intentions[2]. Proof of domicile, therefore, may be expensive and fraught with uncertainty.

19. <u>Objective 5</u>. As a fifth objective of the rules relating to jurisdiction in divorce we suggested that they should be chosen with a view to avoiding the creation of anomalies and hardship. The principal anomalies in the present law have already been noticed in the discussion of the preceding objectives. They include the fact that, unless a wife can found on one of those exceptions to the domicile principle stated in paragraphs 8, 9 and 10, she can apply to the Scottish courts for divorce only if her husband was domiciled in Scotland at the date of service of the summons.

---

1. <u>Ross</u> v. <u>Ross</u>, 1930 S.C. (H.L.) 1, at p.6.
2. <u>Drevon</u> v. <u>Drevon</u> (1864) 34 L.J. (Ch.) 129, <u>per</u> Kindersley V.-C. at p.133.

She cannot found on circumstances which, if she were a man, would lead to the conclusion that she was domiciled in Scotland. This seems to us to be unjustifiable and conducive to hardship. We return to this point in paragraph 34.

20. But it seems equally anomalous to us that, while exceptions to the domicile principle are admitted in favour of wives, no such exceptions are admitted in favour of husbands. In particular, it seems wrong that, for however long a husband may have resided in Scotland, he may not invoke the jurisdiction of the Scottish courts unless he is domiciled there. We revert to this point in paragraph 46.

CURING THE DEFECTS OF THE PRESENT LAW

Application of Personal Law of Spouses

21. Before considering how the defects in the present law may be cured, there is a preliminary matter which must be discussed. It would seem practicable to admit of relatively wide grounds of jurisdiction in divorce if the court in the exercise of its jurisdiction were bound to have regard to the personal law or personal laws of the spouses. This would virtually eliminate any advantages which "forum-shopping" might otherwise present. Would it be desirable to have regard to the personal law?

22. The Morton Commission in examining the residential basis of jurisdiction conferred on married women by section 2(1) of the Law Reform (Miscellaneous Provisions) Act 1949 considered that it was open to the criticism that "no regard is paid to the personal law of the spouses. In consequence, it is very unlikely that a decree given under English or Scots law will

be recognised in the country to which the parties belong by domicile or nationality, and it will there be regarded as a usurpation of the divorce jurisdiction of the courts of that country. Under the European doctrine of cumulation, for a divorce to be recognised as valid it must have conformed both with the personal law and with the law of the country in which the proceedings have taken place"[1]. The Morton Commission, while itself recommending residential bases of jurisdiction, coupled its recommendations with the proposal that the court should look to the personal law of the spouses as well as to the law of the forum. If the personal law were applied, the parties would have no incentive to seek a jurisdiction with favourable divorce laws, so that the grounds of jurisdiction might justifiably be made.

23. We cannot recommend the adoption of this approach, and that mainly for practical reasons:-

(a) It would require proof of foreign law whenever either of the parties was domiciled in or a national of a foreign state. Proof of foreign law is more complicated and expensive in our system, where it must be established by the evidence of witnesses as a matter of fact, than in most European systems where judicial notice may be taken of the relevant foreign rules. Such proof would be particularly difficult in Scotland where there are few persons qualified to give expert advice as to foreign law. Such proof, moreover, would unduly prolong proceedings in undefended suits and substantially increase expenses.

(b) As the Morton Commission's own proposals demonstrate, the ascertainment of the personal law of the spouses is not an easy matter. Even where they share the same personal law, the conflict between the domicile and nationality principles makes necessary the examination of the law of the spouses'

1. Cmd. 9678 (1956), para. 828.

domicile, including its private international law. The position becomes still more complex where the spouses do not share the same personal law, and there the Morton Commission proposed that regard should be paid to the personal laws of both spouses[1]. This would, we think, unduly complicate the task of the courts.

(c) The argument that regard must be paid to foreign law for the purposes of securing the recognition of Scottish decrees abroad is academic where the parties do not intend to return to the country of their domicile or nationality and would become insubstantial if, as seems likely, the draft Hague Convention on the Recognition of Divorces and Legal Separations[2] were to attract general acceptance. Although there are certain exceptions made to this rule[3], Article 6 of the Convention provides that the recognition of a divorce thereunder shall not be refused _inter alia_ because a law was applied other than that applicable under the rules of private international law of the State in which recognition is sought.

24. We conclude, therefore, that in divorce proceedings the Scottish courts must continue to have regard only to the law of Scotland, even if this means that the grounds of jurisdiction must be less extensive than they otherwise might have been.

---

1. Cmd. 9678 (1956), para. 835.
2. Articles 1 to 25 of this Convention are printed as an Appendix hereto.
3. Notably in Articles 7, 19 and 20.

Tests of jurisdiction

25. In considering how the defects in the present law might be removed it seems natural to ask at the outset whether there are any criteria of jurisdiction not at present finding a place in our law, or variants of existing criteria, which might reasonably be adopted. Such criteria include nationality, matrimonial domicile, other variants of the present concept of domicile, and residence with or without additional criteria.

Tests based on the nationality principle

26. Nationality is widely adopted in foreign legal systems as the appropriate test of personal law and, in consequence, most states outside the orbit of the common law exercise jurisdiction in divorce over their own nationals on the basis of that nationality alone. Many of them are prepared to assume jurisdiction in suits involving the citizens of other states, but usually do so only when the ground of divorce is admitted both in their own legal system and in that of the state of the nationality. The principle of nationality is advocated on the grounds that most people do have real ties with the state of their nationality, that a person's nationality is easily ascertained because a change of nationality involves a public act, and that the application of the principle of nationality will ensure that decrees based upon that principle are widely recognised[1].

---

1. It is instructive, however, to notice that the draft Hague Convention on the Recognition of Divorces and Legal Separations (see Appendix), while requiring the recognition of divorces based on the nationality of both spouses (Article 2(3)), does not require the recognition of divorces based on the nationality of the defender alone and does not require the recognition of divorces based on the nationality of the pursuer unless he also fulfils other conditions which point to a real connection with the forum (Article 2(4) and (5)).

27. The Morton Commission did not recommend that nationality should normally form the basis of jurisdiction in divorce but did recommend that the court should have jurisdiction to entertain proceedings for divorce if the petitioner is a citizen of the United Kingdom and Colonies, and is domiciled in a country "the law of which requires questions of personal status to be determined by the law of the country of which the petitioner is a national and does not permit divorce to be granted on the basis of the petitioner's domicile or residence"[1].

28. We agree with the Morton Commission that nationality should not be adopted as a general test of divorce jurisdiction _inter alia_ for the following reasons:-

(a) The principal objection to nationality as a ground of jurisdiction is that this test would not associate the individual with any particular part of the United Kingdom. We think it undesirable to adopt criteria of jurisdiction which cannot be applied in inter-United Kingdom conflicts of law as well as in conflicts involving other legal systems.

(b) Citizenship of the United Kingdom and Colonies is, in our opinion, so broad a basis of divorce jurisdiction that it might sometimes operate in a manner inconsistent with what we consider to be an important objective of jurisdictional rules, namely, that divorce should not be granted to persons without real and substantial ties with the country where the action is raised. Under the British Nationality Act 1948 every person who is either (a) born within, or (b) whose father is a citizen of, the United Kingdom and Colonies is himself a citizen of the United Kingdom and Colonies. Such persons may

---

1. Cmd. 9678 (1956), paras. 811, 840-844 and Appendix IV, paras, 1 and 2.

have had no substantial connection with the United Kingdom for years. Indeed, they may never have had any personal connection with it, since an enormous number of the indigenous inhabitants of present or former parts of H.M. Dominions possess citizenship of the United Kingdom and Colonies. They may have dual nationality but, unless they have formally renounced their citizenship of the United Kingdom and Colonies[1], they would be entitled to resort to our courts for the purpose of obtaining a divorce denied to them by the country of their domicile or habitual residence.

29. Nor do we advocate the adoption of the narrower ground of jurisdiction based on nationality recommended by the Morton Commission. It was specifically designed to meet the situation where a citizen of the United Kingdom and Colonies is domiciled in a country, such as Italy or Spain, which does not make provision for divorce in its own law but which, applying the nationality principle as the test of personal law, would recognise a divorce granted by the courts of the country of nationality to one of its own domiciliaries. Until our nationality laws have been revised, we would not advocate the introduction of this limited basis of nationality as a ground of jurisdiction, even if we thought it right in principle. But we do not think it right in principle because <u>ex hypothesi</u> the persons in question cannot satisfy the test of real and substantial connection which, we think, should be at the root of our law. We reject, therefore, the proposal of the Morton Commission to introduce a limited ground of jurisdiction on the basis of nationality.

---

1. 1948 Act, c.56, s.19.

Tests based on the domicile principle

(1) Domicile in general

30. Tests based on the domicile principle will often fulfil what, we suggested, should be the basic objectives of rules of divorce jurisdiction, namely those of including persons with substantial ties with this country and excluding persons without those ties. It does so because the concept of domicile was developed to point to the place with which a person has the most permanent ties, ties of family, home and sentiment. It seems right that the law of the country with which a person has such ties should continue to apply to him in his family relationships even when he temporarily leaves that country to live elsewhere. If he is to return to the country of his domicile, he has a duty to conform to its laws and a corresponding right to seek their protection. We think, therefore, that the concept of domicile is rightly basic to our rules of divorce jurisdiction.

31. Nevertheless, as the concept of domicile has been developed by case law in the United Kingdom, it has become over-loaded with technicalities which make it, in some respects at least, unsatisfactory as a basis of divorce jurisdiction and certainly unsuitable as the exclusive basis of such jurisdiction. The chief respects in which it is unsatisfactory are these:-

(a) The concept of domicile, at least with the current emphasis upon intention, introduces an undesirable element of uncertainty into the law. We discussed this in paragraph 18.

(b) As the law has been developed during the last century, proof of domicile demands evidence of a permanency of connection which of the nature of things cannot always be

produced. "The intention", the Morton Commission pointed out, "of the resident - must be examined in the greatest detail and, if the evidence shows that he contemplates some event, however uncertain or problematical it may be, on the occurrence of which he will leave the country in which he has long resided, then he will be held to have lacked the intention necessary for acquiring a domicile of choice in that country. In the result, a person who has perhaps spent most of his married life in England may be unable to obtain matrimonial relief unless he is prepared to undergo the trouble and expense of taking proceedings in the country in which English law regards him as being still domiciled"[1].

(c) The domicile of a person, who has abandoned a domicile of choice without acquiring another domicile of choice, is deemed to be his domicile of origin. This domicile of origin a person acquires from his father at birth so that a person may domiciled in a country which he has never visited and with which he has no real social connections. The cases must be rare where divorce jurisdiction has been assumed on the mere basis of a domicile of origin. The artificiality of this rule, however, has attracted criticism,[2] and it is an impediment to the recognition of United Kingdom decrees abroad.

(d) The rule that a married woman's domicile is necessarily that of her husband may have some justification in other branches of the law, but it is extremely artificial in relation to the assumption of jurisdiction in divorce. The rule springs from the old conception of the legal unity of husband and wife; but, once a marriage has broken down and proceedings for its dissolution have been instituted, this unity no longer subsists. We discuss this problem in detail in paragraphs 33-35.

---

1. Cmd. 9678 (1956), para. 793.
2. First Report of the Private International Law Committee, Cmd. 9068 (1954), paras. 8 and 14.

32. The result of these rather technical rules is that a person, in some circumstances, may be regarded as being domiciled in a country with which his social connections are tenuous. The artificiality of these rules has led to various attempts to reform the law of the domicile, either generally or in its application to jurisdiction in divorce. We would consider it inappropriate, in any case, to suggest here general reforms but, apart from this, the failure of previous attempts in recent years to secure such general reforms is daunting[1]. For these reasons we make no suggestions for amending the law of the domicile to alter the emphasis on intention and on permanence of intention or to alter the rules relating to revival of a domicile of origin. We consider, however, that the difficulties associated with proof of intention could be met by introducing habitual residence as an alternative ground of jurisdiction, as we suggest in paragraphs 44 to 48. If a residence test were introduced, we would think it undesirable to alter the emphasis which the current concept of domicile places upon permanence of intention. If, as we argue, nationality should not be applied as a test of jurisdiction, there is a case for permitting expatriate Scots to utilise a test which emphasises intention to return to Scotland at some future date[2].

---

1. General reforms were suggested by the Private International Law Committee in their First Report (Cmd. 9068 (1954)), but attempts to legislate on the basis of this Report proved abortive largely because foreign business men had apprehensions about possible effects on liability for income tax and estate duty. The Private International Law Committee were asked to re-examine the matter and did so in their Seventh Report (Cmnd. 1955 (1963)) but no legislation was introduced following that Report.

2. This point is developed by the Private International Law Committee in its First Report, Cmd. 9068 (1954)), para. 7.

(2) The domicile of married women

33. Suggestions for reform of the application of the concept of domicile to divorce jurisdiction have been made on various occasions, centred especially upon the rule that a married woman's domicile is presumed to be that of her husband. The Private International Law Committee in its First Report recommended that "a woman who has been separated from her husband by a court of competent jurisdiction should be able to acquire a separate domicile, but that otherwise the principle of the unity of domicile of husband and wife should be maintained"[1]. The Committee reaffirmed this recommendation in its Seventh Report[2]. The Morton Commission, on the other hand, recommended that "a wife who is living separate and apart from her husband should be entitled to claim a separate English or Scottish domicile for the purpose of establishing the jurisdiction of the English or Scottish court to entertain divorce proceedings by her"[3].

34. The principle applied in our law that a married woman necessarily shares her husband's domicile - the principle of unity of domicile - leads, in the domain of divorce jurisdiction, to results inconsistent with all five of the objectives of divorce jurisdiction which we identified above[4]. If the courts of the domicile of the husband were the only forum in which a wife might seek a divorce, a wife whose husband was domiciled in, or changed his domicile to, another country could never have her matrimonial differences adjusted in the

---

1. Cmd. 9068 (1954), para. 18.
2. Cmnd. 1955 (1963) paras. 17 and 18.
3. Cmd. 9678 (1956), para. 82.
4. See para. 12.

Scottish courts, however real and substantial her own ties with Scotland. The hardship so arising has been mitigated by the common law rules which allow the court to look at the husband's domicile at the date of his desertion or adultery rather than at the date of service[1] and by the statutory rule permitting the wife to found on her own residence for three years in Scotland when her husband is domiciled outwith the British Islands[2]. A wife, however, with the closest personal ties with Scotland may still have to wait three years before invoking the jurisdiction of the Scottish Courts. The principle of unity of domicile, on the other hand, may enable a wife, by founding on her husband's domicile, to invoke the jurisdiction of the courts of a country with which neither party has at that time substantial ties. The principle, therefore, leads to results inconsistent with the first and second objectives of divorce jurisdiction set out in paragraph 12. In so far, moreover, as the principle facilitates the divorce of persons without substantial ties with a country, it facilitates the granting of decrees which may not attract recognition in other countries, a result inconsistent with the third objective stated above. Abandonment of the unity principle would not contravene that objective, since Article 3 of the draft Hague Convention on the Recognition of Divorces and Legal Separations permits the recognition of decrees based on the independent domicile of a wife.[3] The principle offends the fourth objective suggested in this Memorandum, because the current domicile of an absent husband may be unknown to his wife. It offends the fifth

---

1. See paras. 8 and 9 above.
2. See para. 10 above.
3. See Appendix, Article 3, para. 2.

objective in that it discriminates between one sex and the other. In so doing it ignores the principle of equality of the sexes embodied in Article 17(1) of the Universal Declaration of Human Rights.

35. The hardships and anomalies so arising are such that we are tempted to question the basis of the principle under which a wife acquires and obtains her husband's domicile throughout her married life. But, since this would take us outside the field of divorce jurisdiction, we merely suggest, as did the Morton Commission, that a wife's domicile should be ascertained independently of that of her husband for the purposes of divorce jurisdiction. When a wife has raised an action of divorce, she will no longer be sharing a home with her husband. To impute to her in these circumstances his domicile is to use a fiction without regard to its underlying purposes. It no longer benefits the wife and should be abandoned, as it has been by the United States of America and, more recently, by Australia[1], New Zealand[2] and Canada[3]. We recommend, therefore, that, for the purposes of jurisdiction in divorce, the domicile of a married woman should be ascertained independently of that of her husband.

36. In our view, then, the Court of Session should have jurisdiction in an action of divorce if at the date of service of the summons on the defender <u>either</u> the pursuer or the defender is domiciled in Scotland. We have underlined the word '<u>either</u>' because we think that it should suffice that one of the parties should have those ties with a country which the possession of a domicile implies. We think, too, that it

---

1. Matrimonial Causes Act, No. 104 of 1959 s.24.
2. Matrimonial Proceedings Act 1963, No. 71, s.3(1).
3. Divorce Act 1968, c.24, s.6.

would be wrong for the court to have jurisdiction in an action at the instance of the wife based on her domicile but no jurisdiction in a cross-section at the instance of the husband. We revert to this point in paragraph 49.

(3) Matrimonial Domicile

37. In the middle of the nineteenth century the Court of Session adopted the concept of matrimonial domicile (or domicile of the marriage) as the basis of divorce jurisdiction. "The true inquiry in every such case is where is the home or seat of the marriage for the time, where are the spouses actually resident if they be together, or if from any cause they are separate, what is the place in which they are under obligation to come together and renew, or commence, their co-habitation as man and wife"[1]. This doctrine was rejected by the Privy Council in the case of Le Mesurier v. Le Mesurier[2] and, about the same time, was considered to be no longer a part of the law of Scotland[3]. In the recent case of Indyka v. Indyka[4], however, Lord Reid saw advantages in the doctrine of matrimonial domicile and remarked that "with all respect to the court in Le Mesurier I do not think that there would often be any real difficulty in determining where the spouses' matrimonial home was or with what community they were most closely connected".

---

1. Jack v. Jack (1862) 24 D 467, per Lord Justice-Clerk Inglis at p. 484.
2. [1895] A.C. 517.
3. Dombrowitzki v. Dombrowitzki (1895) 22 R 906, at p.911; Manderson v. Sutherland (1899) 1 F.621
4. [1969] 1 A.C. 33, at p.68.

38. There are attractions in this approach. The matrimonial domicile, as Lord President Inglis understood it, was "the place of residence of the married pair for the time"[1], and the courts of that place will normally be the most convenient courts for the purpose of settling their matrimonial differences. The main objection to it is that the spouses may have lived apart for a number of years and settled in different countries. To apply the matrimonial domicile principle might require the court to assume jurisdiction in cases where there is no current connection between the parties and the forum. This seems to run contrary to the general principles accepted in this country for the assumption of jurisdiction and to the principles accepted in our own and other countries for the recognition of foreign decrees. The principle of matrimonial domicile would not be satisfactory as a unique ground of jurisdiction and would have to be coupled with other grounds. The principle, moreover, would become almost superfluous if residence grounds were introduced into the law. For these reasons, we do not advocate the introduction into our law of the matrimonial domicile principle.

Tests based on residence

39. While we consider that domicile is generally an appropriate basis for jurisdiction in divorce, we have shown also that the present rules for ascertaining domicile, with their emphasis upon permanence of intention, can operate hardship. Domicile meets the needs of parties intending to make their permanent home in a country, but does not meet those of persons whose future intentions are uncertain, whether or not because of the breakdown of the marriage. Yet it is the country where a person has his home for the time being, though

---

1. See Jack v. Jack, supra, at p. 483.

not necessarily his permanent home, which is most closely concerned with the fact of this breakdown and its consequences. The authorities of that country will in practice have to deal with such matters as the maintenance of the wife and children, with the custody of the children, and with the property rights of the parties. The matrimonial differences are likely to have taken place in that country and its courts are likely to be those to which witnesses are most readily cited. There is, clearly, much to be said for treating residence as a basic ground of jurisdiction in divorce.

40. But residence is a term with a broad spectrum of meaning. We would not suggest that the transient residence of persons in Scotland should permit them to invoke the divorce jurisdiction of the Scottish courts. This would open the way to "forum-shopping." The residence should be such as to demonstrate a real and substantial connection with Scotland. In some way, therefore, the concept of residence must be qualified.

41. We considered, in the first place, whether the expression "home" should be used rather than, or in conjunction with, the term "residence". The use of the word "home" was suggested by the Private International Law Committee in their First Report as part of a new set of rules for the attribution of domicile[1]. We reject the term "home" because it is an imprecise term which is open to a variety of interpretations according to the context and the disposition of the hearer. It connotes, in particular, an element of intention to which different persons will give a different weight. Its adoption would maintain the uncertainty which at present is associated with the use of the concept of domicile.

---

1. Cmd. 9068 (1954), para. 13 and Appendix A, Article 2.

42. The Morton Commission recommended that the Court of Session should have jurisdiction to entertain proceedings for divorce inter alia if:-

(a) the pursuer was in Scotland at the commencement of the proceedings and the place where the parties to the marriage last resided together was in Scotland, or

(b) the parties to the marriage were both resident in Scotland at the commencement of the proceedings[1].

43. These grounds of jurisdiction are extremely wide, but it is important to stress that these suggested grounds of jurisdiction were coupled with rules to ensure that the court should not, in the exercise of that jurisdiction, grant a decree of divorce unless the petitioner could in the circumstances of the case have obtained a divorce under the personal law or laws of both parties. In paragraphs 21-24 we gave reasons for our view that it would be undesirable to require the Court of Session to have regard to the personal law in matters of divorce. But, without regard to the personal law, the residential grounds suggested by the Morton Commission would encourage "forum-shopping" and, in all likelihood, fail to attract recognition abroad. For these reasons, we do not advocate their acceptance.

44. The test of residence chosen should, we think, indicate stability of ties with the place of residence. Some qualifying adjective must be used to indicate that it is not enough for a person to make his occasional residence in a place but that, on the other hand, a residence which in substance is stable should not be ignored because the person in question

1. Cmd. 9678 (1956), para. 831.

occasionally leaves it for purposes of business or repose. In our law it has been customary to express this fact by the use of the adverb "ordinarily". We would prefer, however, to avoid using the expression "ordinary residence" in the context of divorce jurisdiction. This preference is based on the fact that, in construing section 2(1) of the Law Reform (Miscellaneous Provisions) Act 1949 and corresponding English legislation, the courts have not always distinguished clearly between the concept of "residence" and that of "ordinary residence". The better view may be that "ordinary residence" is to be contrasted with "occasional" or "casual" residence[1]; but, in Hopkins v. Hopkins[2], where a wife sought to found jurisdiction in divorce upon her own residence for three years in England, Pilcher J. held that there was no ground for applying a different meaning to the words "resident" and "ordinarily resident" over a defined period of time. A similar approach was adopted in the Scottish case of Land v. Land[3] where Lord Wheatley felt constrained to hold that the pursuer's residence for two months in Holland during the triennium was fatal to her contention that she had been ordinarily resident in Scotland for a period of three years immediately proceding the commencement of the proceedings. Having regard to these decisions, we conclude that it would be desirable to find another qualifying adjective to describe that stability of residence which is appropriate to the main criterion of divorce jurisdiction. We are fortified in this

---

1. Cf. Lysaght v. I.R.C. [1927] 2 K.B. 55, per Lawrence, L.J. at p. 74: idem [1928] A.C. 217, per Viscount Sumner at p.243.

2. [1951] P.116; and see the critical note in 67 L.Q.R. (1951) p.32.

3. 1962 S.L.T. 316.

view by the fact that the phrases "ordinary residence" and "ordinarily resident" appear in our revenue law. There is always the possibility that the legislature might wish to use, or the courts to construe, these phrases in a taxing statute in a sense different to that appropriate to an Act relating to divorce jurisdiction. The draft Hague Convention on the Recognition of Divorce and Legal Separations uses the concept of "habitual residence". Since its adoption as a ground of jurisdiction in United Kingdom law would facilitate the recognition of United Kingdom divorces and legal separations in other countries, we strongly advocate its adoption. The concept already finds a place in our law in the Wills Act 1963[1] and in the Adoption Act 1968[2].

45. The use of the criterion of habitual residence might be thought sufficient of itself to indicate those ties with a country which suffice to found jurisdiction. But to qualify a residence as habitual suggests that it has endured for a period of time. There might, therefore, be an element of uncertainty in the law unless this period were specified. Since certainty is of particular importance in this domain, we conclude that the test should specify the duration of residence required before jurisdiction may be assumed. But the period of time appropriate depends, to some extent at least, upon whether jurisdiction may be founded only upon the residence of both spouses, or upon that of the pursuer or defender or either of them. This question we now consider.

46. We think that it would be wrong to demand that both spouses should reside within the territory. Exceptions would be required to meet the case of the spouse, long resident

---

1. c.44, s.1.

2. c.53, s.11.

within the jurisdiction, whose partner is neither resident nor domiciled there. The fact, on the other hand, that the defender has resided for a period within the jurisdiction should found jurisdiction in actions against him. It is likely to be the most convenient forum from his point of view and "forum-shopping" is unlikely without his connivance. The habitual residence of the defender is a well-recognised ground of jurisdiction abroad and, under the draft Hague Convention on the Recognition of Divorces and Legal Separations, it suffices that the defender should have had his habitual residence within the State in which the action is raised at the time when it is raised[1]. We think that this ground of jurisdiction should be adopted into our law. We come next to the residence of the pursuer. As a ground of jurisdiction it is open to the objection that the pursuer, by changing his residence, may select a forum of his own choice. The risk of this, however, should not be exaggerated. "Forum-shopping" is rather a sequel to lax substantive grounds of divorce than to lax rules of jurisdiction. In any case, if the residence must have endured for a period of time, "forum-shopping" becomes impracticable for ordinary men or women who must earn their livelihood. The law of Scotland already admits a residential ground of jurisdiction under section 2(1) of the Law Reform (Miscellaneous Provisions) Act 1949, although this ground of jurisdiction may be invoked only by wives whose husbands are not domiciled in another part of the United Kingdom, or in the Channel Islands or the Isle of Man. We consider that a husband should be able to apply to the Scottish courts for divorce if he has established durable ties with Scotland. Nor do we think that a pursuer should be able to invoke the jurisdiction of the courts of his habitual residence in Scotland only if the defender is not domiciled in some other part of the British

---

1. See Appendix, Article 2(1).

Islands. Subject to the "conflict rules" which we propose in paragraphs 68 and 69 to prevent duplication of actions within the United Kingdom, there should be no difference between the rules which apply where the defender is domiciled within the British Islands and those which apply where he is domiciled outside them. Habitual residence should be treated as a ground of jurisdiction equal in weight to domicile.

47. We have given much thought to the question of what length of time should suffice to found jurisdiction on the basis of habitual residence. The period selected should demonstrate the existence of real ties with the forum; it should be of a duration to discourage all but the most assiduous "forum-shopping;" it should be of such duration that a decree pronounced in the exercise of this jurisdiction should attract international recognition; but it should not be a period such that a spouse whose marriage has broken down should have to wait for a long time before his or her matrimonial status may be regularised. We believe that a period of one year should suffice both in the case of pursuers and defenders; and we are encouraged in this view by the basis of Article 2(2)(a) of the draft Hague Convention[1] which provides for the recognition of decrees founded upon the habitual residence of the pursuer within the jurisdiction for not less than one year prior to the institution of the proceedings. We think that the same period should apply to the defender because, in many actions of divorce, it is a matter of chance which is the original pursuer and which the original defender.

---

1. See Appendix.

Suggested residence test

48. We summarise this part of our argument by saying that the Scottish courts should have jurisdiction to entertain an action of divorce if either the pursuer or the defender is resident in Scotland at the date of citation of the defender and has been habitually resident there for a period of one year immediately preceding that date. (See Rule 2 in para.76). By framing the test so as to demand a residence only at the date of service, coupled with habitual residence throughout the preceding year, we adopt the same approach as section 2(1) of the 1949 Act (c.43) and avoid the necessity of enquiring into the future intention of a party. The habitual character of the past residence is determined by the settled nature of that residence over a period of time and the court is not concerned to ascertain whether or not the party intends to maintain his habitual residence in Scotland in the future. This criterion, we suggest, fulfils all the objectives which we set out in paragraph 12. It would render superfluous section 2(1) of the Law Reform (Miscellaneous Provisions) Act 1949, and we advocate its repeal.

JURISDICTION IN CROSS-ACTIONS

49. It has been held in England that, where proceedings for divorce are instituted by a wife on the basis of her residence for three years in England under a rule corresponding to section 2(1) of the Law Reform (Miscellaneous Provisions) Act 1949, a cross-petition on the part of her husband is incompetent unless he is domiciled in England since the rule applies in terms only to petitions by the wife[1]. But it is clearly unsatisfactory that, where a husband (or, indeed, a wife) finds a competent divorce action directed against him in any country, he should not be able to raise a cross-action

---

1. Levett v. Levett and Smith [1957] P. 156.
Cf. Russell v. Russell & Roebuck [1957] P.375

there. We have in part provided against this contingency by framing our general rules of jurisdiction based on domicile and habitual residence so that the Court of Session should have jurisdiction in proceedings for divorce if either the pursuer or the defender fulfilled the appropriate criteria at the date when the summons was served. But the problem would remain where, after raising a divorce action founded upon his or her domicile or habitual residence in Scotland, the original pursuer left Scotland, with the intention of remaining away, before a cross-action is raised. We advocate, therefore, that when the Court of Session is exercising jurisdiction in a divorce action, it should have jurisdiction to entertain a cross-action of divorce. This principle accords with Article 4 of the Hague Convention[1]. We suggest further that this ground of jurisdiction should not be confined to cross-actions of divorce but should extend to all actions affecting the marital status of the parties subsequently raised by the defender in the original divorce action. This seems preferable to forcing the defender to raise, for example, a nullity action in another country and thereafter to apply for the divorce action in Scotland to be sisted. The rule should also apply to an action of judicial separation as some defenders may prefer that remedy to divorce.

SUMMARY OF PROVISIONAL CONCLUSIONS

50. In collaboration with the Law Commission we framed rules which both Commissions agreed contained the substance of our common provisional conclusions for reform of divorce jurisdiction in Scotland and England. As we believe that these rules may assist towards an understanding of the nature and effect of our conclusions, they are printed in paragraph 76 of

1. See Appendix.

this Memorandum. Rules 1, 2 and 3 represent the provisional conclusions that we have made in the preceding paragraphs of this Memorandum.

JURISDICTION IN JUDICIAL SEPARATION

51. The grounds of jurisdiction in actions containing conclusions for aliment vary with the nature of the action and the court in which the actions are brought. Examination of jurisdiction in alimentary actions is beyond the scope of this Memorandum, but we cannot recommend changes in the law relating to jurisdiction in divorce without considering the relationship of divorce with actions of separation and aliment. One of the reasons why the Morton Commission[1] recommended the retention of judicial separation was that it provided an alternative remedy for those who have religious or conscientious objections to divorce. This seems to us, and to the Law Commission[2], to be a good reason for extending our suggested Rules 1, 2 and 3 for divorce jurisdiction to include jurisdiction in actions of separation and aliment. We do not suggest that the existing grounds of jurisdiction in actions of separation and aliment should be restricted at this stage. The Court of Session would still be free to exercise jurisdiction *ex necessitate* based on the residence of both parties[3] and the statutory grounds of jurisdiction in the Sheriff Courts would be unaffected. The effect of our suggestion is that a wife's independent domicile and the habitual residence in Scotland of either party for the twelve months immediately preceding the raising of an action of separation and aliment would be additional grounds of jurisdiction in the Court of Session.

---

1. Cmd. 9678, para. 303.
2. See Published Working Paper, No. 28, para. 88.
3. *Jelfs* v. *Jelfs* (O.H.), 1939 S.L.T. 286; *Luke* v. *Luke* (O.H.), 1950 S.L.T. (Notes) 6.

JURISDICTION IN PETITIONS FOR THE DISSOLUTION OF MARRIAGE ON THE GROUND OF PRESUMED DEATH

52. Until the Divorce (Scotland) Act 1938 came into force, no special provision was made by Scots law for the dissolution of a marriage on the ground of the presumed death of one of the spouses. The common law decree of declarator of death could be obtained by a spouse only if either he or she could establish facts and circumstances pointing clearly to the death of his or her partner or if that partner had reached an age when he could no longer be presumed to live[1]. Section 5 of the 1938 Act altered the common law by enabling the court to grant a decree of dissolution of marriage on the ground of the presumed death of a spouse where it is satisfied that reasonable grounds exist for supposing that he or she is dead. In these proceedings "the fact that for a period of seven years and upwards the other party to the marriage has been continually absent from the petitioner and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead unless the contrary is proved"[2].

53. We have pointed out in our Memorandum No. 11 on Presumptions of Survivorship and Death that the 1938 Act gave no guidance as to the appropriate rules of jurisdiction in such actions. The court, however, having regard to the general rules for jurisdiction in divorce, required that the petitioner should be domiciled in Scotland at the date of the action. By reason of the operation of the rule that a wife's domicile follows that of her husband, the wife of a man who disappeared was bound in principle to establish her husband's domicile at the date of the action. This heavy burden was

---

1. See our Memorandum No. 11 on Presumptions of Survivorship and Death, paras. 3 and 4.
2. 1938 Act, c.50, s.5(2).

lightened, however, by the application of the rule that a person's domicile once established, is presumed to subsist in the absence of evidence to the contrary[1]. Even so, a person could not invoke the jurisdiction of the Court of Session on the ground of his or her residence in Scotland; the man's domicile in Scotland at the date of his disappearance had to be established.

54. The rigour of this rule was mitigated by section 2(3) of the Law Reform (Miscellaneous Provisions) Act 1949, which declares that in such petitions the court shall have jurisdiction where the petitioner is domiciled in Scotland. In determining whether for this purpose a woman is domiciled in Scotland, her husband is treated as having died immediately after the last occasion on which she knew, or had reason to believe, him to be alive. But the section also provides that, in proceedings by a wife, the court has jurisdiction where she is resident in Scotland and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings. These rules are open to objections similar to those applying to actions of divorce, in particular, to the objections -

(a) That a man, however long he may have resided in Scotland, cannot obtain relief in the Scottish courts unless he is domiciled there:

(b) That a woman of Scottish origin, married to a man domiciled abroad, cannot obtain relief in Scotland unless she returns and resides there for no less than three years; and

(c) That a person's domicile is not always easy to establish, particularly after a lapse of time.

---

1. Labacianskas v. Labacianskas 1949 S.C. 280.

55. We consider that the law in its present state is unsatisfactory and suggest its amendment. The Morton Commission[1] treated petitions for dissolution of marriage on the ground of presumed death as if their primary purpose was to obtain a decree presuming death and, on the view that presumption of death was simply a matter of evidence for the lex fori, recommended that the courts in England and Scotland should have jurisdiction if the applicant were domiciled or resident within their respective jurisdictions. We do not regard this approach as satisfactory. Such petitions resemble more closely consistorial than ordinary actions in respect that they provide a ground for dissolving marriage additional to the grounds of divorce. Their primary purpose is to dissolve the marriage, not to presume death. For jurisdictional purposes we consider that such petitions ought to be classified with actions of divorce so that the grounds of jurisdiction are similar for both.

56. We suggest, therefore, that, both to remedy the defects to which we drew attention in paragraphs 13-20, supra, and to secure general correspondence with the other rules advocated in this Memorandum, the courts of Scotland[2] should have jurisdiction for dissolution of a marriage on the ground of a person's presumed death when -

(a) the pursuer (at present, petitioner), at the date of service of the summons (at present, petition), is domiciled in Scotland; or

(b) the prusuer or petitioner, at the date of service of the summons or petition, is resident there for a period of one year immediately preceding that date; or

1. Paras. 846-7.

2. We use this expression because in our Memorandum No 11, para. 50, we suggest that both the Court of Session and the Sheriff Courts should have jurisdiction to hear actions for declarator of death or presumption of death and, in such actions, to declare that the marriage of the missing person has been dissolved.

(c) the missing person was domiciled in Scotland at the time when he or she was last known, or with reason thought, to be alive.

We suggest also, in line with our recommendation in paragraph 35, that for the purpose of the immediately preceding rules the domicile of a married woman should be determined independently of that of her husband.

Part II

CONFLICTS OF JURISDICTION

GENERAL

57. It is clearly undesirable that two or more actions of divorce should proceed at the same time and between the same parties in different jurisdictions. Concurrent actions are wasteful of judicial effort and of the parties' resources and may lead to conflicting decisions with their attendant problems. While concurrent actions are a consequence in part of overlapping jurisdictional rules, they arise primarily from differences in the procedural or substantive laws of the jurisdictions concerned. One of the parties seeks in another forum an advantage not available to him in the forum selected by his spouse. Unless - and this seems visionary - international harmonisation of the procedural and substantive law of divorce is achieved, conflicts of jurisdiction are likely to continue. We may seek, however, to ensure that they are not facilitated.

58. There are at present no rules to this and in Scots law. Even the principle of forum non conveniens is inapplicable in actions of divorce[1]. The theory of the law is, or was, that rules regulating conflicts of jurisdiction are unnecessary

---

1. Marchant v. Marchant, 1948 S.L.T. 143.

because, as Lord Watson stated in the Le Mesurier case[1], "according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage". This principle would have prevented conflicts of jurisdiction (though at some cost and disadvantage to the parties) if in fact it had received general international recognition and if the term 'domicile' had been characterised in the same way throughout the world; but it was rarely followed in countries outside the orbit of the common law and there have been departures from it[2] even within the confines of the United Kingdom. Moreover, 'domicile' does not have precisely the same meaning even within the common law countries. Conflicts of juris-distion, therefore, could and did arise. In England, departures from the Le Mesurier principle have not been confined to the rules for the assumption of jurisdiction. The cases of Travers v. Holley[3] and Indyka v. Indyka[4] are obvious departures from it in the domain of the recognition of foreign divorces. The precise status of these decisions in Scotland is unclear, but we understand that it is the intention of the United Kingdom Government to introduce legislation to allow ratification of the draft Hague Convention on the Recognition of Divorces and Legal Separations[5]. Such legislation would require our courts to recognise foreign decrees on the basis of criteria

---

1. Le Mesurier v Le Mesurier [1895] A.C. 517, per Lord Watson at p. 540.
2. See paras. 8-11 supra.
3. [1953] P. 246, approved in Indyka v. Indyka [1969] 1 A.C. 33 by Lords Morris, Pearce, and Pearson
4. [1969] 1 A.C. 33.
5. See Appendix.

of habitual residence and nationality as well as of domicile. It follows that the Court of Session might be bound to recognise foreign non-domiciliary decrees of divorce obtained during the subsistence of proceedings for divorce in Scotland. It would seem, therefore, that, apart from the recommendations made in this Memorandum for the extension of the Scottish grounds of jurisdiction in divorce, the time has come when legislative provision ought to be made for the situation where actions of divorce are proceeding concurrently in Scotland and in another country. The need, however, for such provision would be increased if the Scottish rules for the assumption of jurisdiction were widened, whether or not precisely in terms of our recommendations in this Memorandum.

59. Since it is impossible to obtain a common basis for the resolution of jurisdictional conflict between our own and foreign courts, in the wide field of international conflict we are forced to accept the limited objective of finding a rule that will operate satisfactorily in the environment of a domestic jurisdiction based on domicile or habitual residence and of the Hague Convention rules for recognition of foreign decrees. We do not consider that the plea of forum non conveniens, even with adaptations, would be satisfactory, because the circumstances where it may be applied are too narrow. Balance of convenience to the parties is not enough. "The plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice"[1]. The emphasis is not on the interests of the parties but on the ends of justice. "The object ... is to find that forum which is more suitable for the ends of justice,

---

1. Sim v. Robinow (1892) 19 R. 665, per Lord Kinnear at p.668.

and is preferable because pursuit of the litigation in that forum is more likely to secure those ends"[1]. A court, however, is naturally reluctant to declare that the proceedings before it are less likely to secure justice than those of a foreign court. The opinion in Sealey v. Callan[2] suggests that the English courts would seldom think it appropriate that the status of a petitioner resident in England should be determined by the courts of another country. We have no reason to think that the Court of Session would take a different line. Examination of the cases in which the plea of forum non conveniens has been tabled has convinced us that the introduction of that plea into the field of divorce jurisdiction would not achieve our limited objective of reducing the risk of divorce actions running concurrently in Scotland and elsewhere.

60. What is required is a broad rule which will lead the court to sist the action before it where this should obviously be done. We suggest that, where the Court of Session is entertaining a divorce action at the instance of one spouse and there is a second divorce action between the same spouses in dependence in another country, the Court of Session should sist the action before it if the Court, having regard to all the circumstances, considers that the other action should be disposed of first. The strongest case for the application of this rule is where the Scottish summons is served shortly before the date of proof in the foreign action. Other cases would be where the foreign action was for nullity or where a third party sought a declarator in foreign proceedings that he or she was married by prior ceremony to one or other of the parties to the Court of Session action. We, therefore, suggest that this rule should be of general application to all foreign proceedings relating to the marriage of the parties or affecting their

---

1. Societe du Gaz de Paris v. Armateurs francais, 1926 S.C. (H.L.) 13, at p.22.
2. [1953] P.135.

marital status. If this rule is to serve its purpose, we further suggest that it should be the duty of pursuers in divorce actions in the Court of Session to inform the court of the existence of any proceedings, whether concluded or in dependence, of which they have knowledge, in any other country relating to the marriage of the parties or affecting their marital status, whether or not those proceedings have been instituted by the pursuer. The duty to inform must include "concluded" foreign proceedings, because a valid decree of divorce or nullity granted by a foreign court would render nugatory a subsequent action of divorce in Scotland. Suggestions similar to those made in this paragraph have been made by the Law Commission in their Published Working Paper No 28.

PROPOSED GENERAL RULES

61. A rule giving effect to the above suggestions might be framed as follows:-

4(1) It shall be the duty of the pursuer in every action of divorce to inform the court of the existence of any proceedings, whether concluded or in dependence, of which he has knowledge, in any other country relating to the marriage of the parties or affecting their marital status, whether or not those proceedings have been taken at his own instance.

(2) Where such other proceedings are in dependence, the court shall sist the proceedings before it, either *ex proprio motu* or on the application of any party, if the court considers, having regard to all the circumstances, that those other proceedings should be disposed of first.

While this "conflict rule" could be expressed in discretionary terms, we think that it is clearer to express it in mandatory form. The rule would not prevent divorce actions from starting in different parts of the United Kingdom, but it should at least restrict the number of runners. For the reasons given

in the succeeding paragraphs we have not felt able at the present time to advocate a more positive rule to inter-United Kingdom conflicts, and we doubt the practicality of having a more positive rule governing international conflicts of jurisdiction. However, we invite criticisms of our Rule 4 and alternative suggestions.

62. We do not intend that Rule 4 should prevent the court from exercising its existing discretionary power to sist an action of divorce where it is the only action in any court. As we have endeavoured to frame a set of comprehensive rules governing divorce jurisdiction and conflicts of jurisdiction, we include Rule 5[1] to preserve the existing discretionary power.

DUAL JURISDICTION OF COURTS IN THE UNITED KINGDOM

63. The basic difference between the problems of international and inter-United Kingdom conflicts is that, in the case of the latter, it is possible for Scotland, England and Northern Ireland to agree to adopt procedural rules designed not merely to resolve conflicts when they arise but to prevent them from arising. At present the rules for the assumption of jurisdiction in Scotland, England and Northern Ireland are virtually identical and they are such that the likelihood of two actions proceeding simultansously in two or more countries is small. If, however, the basis of divorce jurisdiction is widened as we have suggested, and especially if there are similar changes in England and Northern Ireland (as in the interests of uniformity is obviously desirable), the possibilities of conflicts of jurisdiction will be increased. If the basis of jurisdiction in each country is to be the domicile or one year's residence of either the pursuer or the defender, there will

---

1. See para. 76, <u>infra</u>.

necessarily be many cases in which the courts of more than one part of the United Kingdom have jurisdiction. One spouse may be resident in Scotland and the other in England; or one or both may be resident in Scotland, and the other or both may be domiciled in England; or one may be resident in Scotland but domiciled in Northern Ireland and the other resident or domiciled in England. Therefore, unless the problem is dealt with specifically, there are bound to be cases in which two (or even all three) countries have jurisdiction; and there may be actions pending in more than one of those countries with the same spouse as pursuer or, more probably, with the other spouse as pursuer.

UNITED KINGDOM CONFLICT RULES

64. Within the boundaries of a single state such as the United Kingdom conflicts of jurisdiction in matters of divorce and judicial separation are arguably more objectionable because they are likely to be more frequent and because, at least in large measure, they could be prevented. Priority could be given either to the proceedings first instituted or to those instituted in that part of the United Kingdom with which the spouses are most closely connected. It is an objection, however, to any rule specifying the circumstances in which one United Kingdom court should have jurisdictional priority over another that it would preclude one of the parties from invoking the jurisdiction of a court which is normally competent. This would matter less if it had no material effect upon his success in the divorce proceedings. But, if the substantive grounds of divorce differed materially in England and Scotland, a rule of jurisdictional priority might effectively prevent a spouse with English jurisdictional qualifications from seeking and obtaining in an English court the remedy of divorce on a ground not available in Scotland. When the Divorce Reform Act 1969 comes

into effect on 1st January 1971 a rule of jurisdictional priority might debar an English spouse married to a spouse with Scottish connections from availing himself of either of the separation grounds specified in Section 2(1)(e) and (f) of the 1969 Act. We believe that this result would be generally unacceptable. With some reluctance therefore - since we value the certainty inherent in a rule laying down clear criteria for priority of jurisdiction - we conclude that no rule of jurisdictional priority should be introduced for the present and that the disadvantages of concurrent actions in divorce should be mitigated by the operation of the general "conflict rules" suggested in paragraphs 61 and 61.

65. We must make it quite clear, however, that in our view an entirely different situation would arise if the Scottish law of divorce were amended on principles not materially different from those laid down in the Divorce Reform Act 1969 and in the Matrimonial Proceedings and Property Act 1970. In this situation there would be little incentive to "forum-shopping" as between England and Scotland and no injustice would appear to be done to either of the parties by requiring him or her to select one forum within the two countries in preference to another. Scotland and England might be regarded as administering a common divorce law and there would seem to be no good reason why positive rules should not be enacted giving priority to one jurisdiction rather than the other.

66. Given, then, substantial uniformity of law in matters relating to divorce within the United Kingdom, we think that it would be desirable to have, within the frame-work of the general rules of jurisdiction in divorce, a set of clear rules for the allocation of divorce actions between different courts in

the United Kingdom. The rule of forum non conveniens, we believe, would not adequately solve the problem, since there are likely to be many cases in which each court would regard itself as the most convenient forum. A first-come first-served rule, while adopted recently in Canada[1] to resolve competition between divorce actions in different provinces, would be equally unsatisfactory. It might encourage a spouse to raise an action of divorce precipitately to ensure that it was heard by the forum of his own choice. It is also an arbitrary rule, without a logical basis. Precedence cannot be given to domicile over residence or to residence over domicile; we regard them as truly alternative grounds of jurisdiction. Common domicile is inappropriate if wives are to be capable of founding divorce jurisdiction on their own independent domiciles. A common residence test would not provide an answer in the many cases in which parties are habitually resident in different parts of the United Kingdom. We reject the test of matrimonial domicile on the ground that it is artificial to apply it in a situation where the parties may have lived apart for some time; further, it could not be applied in cases in which the last matrimonial home was outside the United Kingdom and might lead to difficulty in definition. A rule which could be applied in all cases would be one which required a court to decide which of the spouses had the more substantial connection with those parts of the United Kingdom having jurisdiction over them respectively. The defect in this rule, and we regard it as fatal, is that it would involve a detailed inquiry into the past history of each spouse, which would be time-consuming, expensive and of uncertain outcome.

67. In seeking to formulate rules for the allocation of divorce actions between United Kingdom courts we consider that it would be desirable -

---

1. Divorce Act 1968. c.24. s.5(2).

(1) to preclude, if possible, a situation in which separate divorce actions are proceeding concurrently in different parts of the United Kingdom:

(2) to leave, so far as possible, the grounds of jurisdiction conferred by Rule 2 to operate generally, even in cases where there is concurrent jurisdiction within the United Kingdom:

(3) to provide simple rules in clear terms and capable of precise application for determining which of two or more concurrent jurisdictions will be pre-eminent: and

(4) to discourage spouses from raising precipitately actions of divorce.

68. The first of these objectives we suggest, may be met by providing - as we provide in Rule 6, <u>infra</u>[1] - that a spouse who has served, or been served with, a summons or petition in divorce or nullity proceedings instituted in one part of the United Kingdom should not thereafter be permitted to serve a summons or petition in divorce proceedings in another part of the United Kingdom unless the first mentioned proceedings have been terminated or sisted. If service of a second divorce action were permitted while the original action is proceeding, the position would be complicated by the fact that, whatever conflict rule is selected, it has to be applied in each action in two different courts. If the original court is to determine the question of whether or not the divorce action before it should proceed before a second action is raised, the position is simplified and duplication of actions prevented. While jurisdiction in nullity actions is outwith the scope of this Memorandum we include nullity actions in this rule for the sole purpose of preventing a spouse from raising a divorce action in

1. Para. 76.

one part of the United Kingdom when a nullity action is in dependence in another part. This rule, however, requires to be supplemented by further rules giving guidance to the courts as to the grounds upon which the first action of divorce may be sisted to enable a second action of divorce to be raised in another part of the United Kingdom.

69. The second of the objectives stated in paragraph 67 above, we consider, may best be met consistently with the first objective by permitting a spouse to raise an action of divorce in any court competent under the general jurisdictional rules but allowing the defender, if he so wishes, to object to the court assuming jurisdiction on specified grounds which, being established, would demonstrate that the original court is less appropriate than another United Kingdom court to try the case. We suggest, therefore, that our second objective could be met by requiring - as we require in Rule 7, infra[1] - the court in which an action of divorce is raised to sist that action if a motion for sist is enrolled on behalf of the defender within, say, six weeks of service of the summons, or such longer period as the court may allow on cause shown, and the defender satisfies the court on the following matters:-

(a) that the defender is not domiciled in that part of the United Kingdom and had not been habitually resident there throughout the previous twelve months;

(b) that the place where the parties last habitually resided together was not in that part of the United Kingdom; and

(c) that since the service of the summons, the courts of another part of the United Kingdom would have had jurisdiction under Rule 2(b) to entertain divorce proceedings on the ground of the defender's habitual residence there.

---

1. Para. 76.

We propose that this rule should be limited in its application to the first divorce action raised in order to prevent the pursuer in the original action invoking the rule in relation to proceedings raised subsequently by the defender in the first action in the other part of the United Kingdom. Our suggested Rule 7, therefore, includes a proviso imposing this limitation.

70. These rules give priority to habitual residence rather than to domicile and to the habitual residence of the defender rather than that of the pursuer. Preference is given to habitual residence for the reasons adduced above, especially in paragraph 31. Condition (c) is so framed that the defender may not object to the jurisdiction of a court in one part of the United Kingdom merely on the ground of his domicile in another part. The fact of his domicile in one part of the United Kingdom without a habitual residence there is unlikely to indicate that the defender has a connection with that part closer than the pursuer's connection with the part of the United Kingdom in which he is either domiciled or habitually resident for a twelve-month period. The emphasis, however, upon habitual residence is not exclusive: condition (a) is so framed that the defender cannot object to the jurisdiction of a court in that part of the United Kingdom in which both parties are domiciled. The rules, moreover, give priority to the forum of the defender over that of the pursuer. The courts, for example, of that part of the United Kingdom where the defender has habitually resided for a year or more are preferred to those of the part where the pursuer has so resided and that even when the pursuer is also domiciled there. They give, and deliberately give, a preference to the forum of the defender on the view that a person who seeks a judicial remedy should consult the convenience of the person against whom it is sought, an idea expressed in

the brocard actor sequitur forum rei. The pursuer, however, would require to follow the defender to the courts of his habitual residence only in the comparatively small number of defended actions in which the defender is both entitled and likely to object under Rule 7 to the action being heard by the court having jurisdiction over the pursuer.

71. The application of the rules suggested in paragraphs 68 and 69 would meet the third objective stated in paragraph 67. Rules 6 and 7 are definite ones, which would enable solicitors with reasonable certainty to advise their clients, where there is a possibility of an objection to the choice of forum, of a forum to which no objection may be taken. If, for example, the defender has only one habitual residence in the United Kingdom - which will normally be the position - the pursuer may be advised that no objection can be taken to the forum of the defender's habitual residence. He may equally be advised that he is safe to choose the forum of his own habitual residence or domicile if that coincides with the place where the parties last habitually resided together or the defender's habitual residence.

72. Nothing in the rules suggests that they would encourage the precipitate raising of divorce actions and so run counter to our fourth objective. We may add that they should operate in a practical and economic way. The pursuer is never required to establish the defender's domicile, always a difficult task. The defender has the burden of negativing the claim that the action should be heard in the court of the pursuer's choice, but the facts which the defender is required to establish if the objection to the jurisdiction is to be sustained are all facts within his own knowledge.

73. If Rules 6 and 7 are acceptable, Rule 4 would still be necessary to govern conflicts of jurisdiction between a court in the United Kingdom and (a) a foreign court or (b) in extraordinary circumstances, another court in the United Kingdom. Rule 4 requires disclosure by the pursuer of the existence at any time of any other consistorial proceedings. Rule 6 renders a second divorce action incompetent so that it would be dismissed; but, if service is made on the same day of two divorce actions raised in different parts of the United Kingdom by each spouse, both courts may find it impossible to decide which summons or petition was first served. In that extraordinary situation Rule 4 would operate. If Rule 4 fails to stop one or other of these actions, the first decree to be pronounced would dissolve the marriage, as it would have been pronounced by a court of competent jurisdiction under Rule 2.

74. We considered whether it was necessary to confer upon the Court of Session the additional power, which the English courts have, of dismissing a divorce petition on the ground that the petitioner has unreasonably delayed in proceeding with it. There may be cases in which the defender in an action raised in Scotland wishes to raise an action in England or Northern Ireland but has no grounds of objection under Rule 7 to the Scottish action proceeding. The question is whether he should be forced to raise his action in the form of a cross-action in Scotland, where its progress might be retarded by dilatory tactics on the part of the pursuer. Provision could be made for dismissal of the Scottish action on the ground of unreasonable delay on the part of the pursuer, and the defender could thereafter proceed in England. If, however, a pursuer is guilty of such unreasonable delay, this would afford cause for sisting the Scottish action under Rule 5, and, if it were sisted, Rule 6 would not then render incompetent a second action in

England. Our provisional conclusion is that it is unnecessary to make express provision for dismissal of an action on the ground of the pursuer's unreasonable delay since dismissal of one action would not prevent the pursuer from immediately raising a second action on the same grounds in the same court; but we invite comments on this point.

SUMMARY OF PROVISIONAL CONCLUSIONS IN PART II

75. We summarise the provisional conclusions stated in Part II of this Memorandum as follows:-

(1) If the existing grounds of divorce jurisdiction in Scotland are extended before the substantive Scots law of divorce is altered, the extending legislation should include a rule on the lines of Rule 4[1] to govern all cases of conflicting jurisdiction.

(2) If the substantive Scots law of divorce is amended before or at the time when the existing grounds of divorce jurisdiction are altered for both Scotland and England, so that there is no greater difference than there is now between the grounds of, and financial provisions on, divorce and the jurisdictional rules in both Scotland and England, the legislation which extends the jurisdictional rules should include additional rules on the lines of Rules 6 and 7[1].

(3) We consider Rules 6 and 7 to be suitable for application by all parts of the United Kingdom which are applying common jurisdictional tests for divorce <u>and</u> a divorce law substantially the same as that which will come into force in England on 1 January 1971, but not otherwise.

We invite comments on and criticisms of these provisional conclusions and, above all, constructive suggestions.

---

1. See para. 76

Part III

PROVISIONAL CONCLUSIONS IN PARTS I AND II EXPRESSED AS RULES

76. The rules printed below are not intended to take the place of Clauses but merely express our provisional conclusions, and those of the Law Commission, in the form of rules, which incorporate the principal conclusions stated by the Law Commission in their Working Paper No. 28 published in April 1970.

Suggested Jurisdictional Rules

1. For the purposes of these rules the domicile of a married woman shall be determined independently from that of her husband.

2. A court in any part of Great Britain which now has jurisdiction in divorce proceedings shall have jurisdiction in such proceedings and in actions of separation and aliment where, at the date of service of the summons or petition on the defender, either the pursuer or the defender is -

   (a) domiciled in that part of Great Britain, or

   (b) resident in that part of Great Britain and has been habitually resident there for a period of one year immediately preceding the date of service of the summons or petition on the defender,

and not otherwise, save as provided in Rule 1.

3. A court in any part of Great Britain which is exercising jurisdiction in a divorce action at the instance of one spouse shall have jurisdiction to entertain any action relating to the marriage of the parties, or affecting their marital status, raised by the other spouse.

Suggested Procedural Rules

4(1). It shall be the duty of the pursuer in every action of divorce to inform the court of the existence of any proceedings, whether concluded or in dependence, of which he has knowledge,

in any other country relating to the marriage of the parties or affecting their marital status, whether or not those proceedings have been taken at his own instance.

(2) Where such other proceedings are in dependence, the court shall sist the proceedings before it, either *ex proprio motu* or on the application of any party, if the court considers, having regard to all the circumstances, that those other proceedings should be disposed of first.

5. Any court in Great Britain may sist an action or petition or cross-action or cross-petition for divorce, either *ex proprio motu* or on the application of any party.

Additional Procedural Rules Suggested as Suitable for Application in the event of the Substantive Law of Divorce in Scotland being brought into line with England by the inclusion of two and five years' separation as additional grounds of Divorce, with consequential amendments to Financial Provisions on Divorce in Scotland.

6. It shall be incompetent for a spouse who has served, or been served with, a summons or petition in divorce or nullity proceedings instituted in one part of Great Britain thereafter to serve a summons or petition in divorce proceedings in another part of Great Britain unless the first-mentioned proceedings have been terminated or sisted.

7. A court in one part of Great Britain shall sist divorce proceedings if the defender applies for a sist within six weeks of service of the summons or petition, or such longer period as the court may allow on cause shewn, and satisfies the court -

(a) that the defender is not domiciled in that part

of Great Britain and had not been habitually resident there throughout the preceding twelve months: and

(b) that the parties did not last habitually reside together in that part of Great Britain: and

(c) that since the service of the summons or petition, the courts of another part of Great Britain would have had jurisdiction under Rule 2(b) to entertain divorce proceedings on the ground of the defender's habitual residence there;

provided that, where divorce proceedings are subsequently instituted in that other part of Great Britain after the original proceedings have been sisted under this Rule and while they remain so sisted, it shall not be competent for any court in that other part of Great Britain to grant under this Rule or under Rule 4(2) a sist of the subsequent proceedings.

<u>Suggested Jurisdictional Rules for Proceedings for Dissolution of Marriage on the Ground of Presumed Death</u>

8. The Court of Session shall have jurisdiction in proceedings for dissolution of a marriage on the ground of a person's presumed death when -

(a) the petitioner (or pursuer), at the date of service of the petition (or summons), is domiciled in Scotland; or

(b) the petitioner (or pursuer), at the date of service of the petition (or summons), is resident in Scotland and has been habitually resident there for a period of one year immediately preceding that date; or

(c) the missing person was domiciled in Scotland at the time when he or she was last known, or with reason thought, to be alive.

If the reform of the procedure for judicial pronouncement of the presumed death of a missing person suggested in our Memorandum No. 11 is accepted, so that a specific conclusion for dissolution of marriage could be included in a general action for declarator of death or of presumed death, we suggest that Rule 8 should also be applied to the Sheriff Courts.

APPENDIX

HAGUE CONFERENCE ON PRIVATE

INTERNATIONAL LAW

(OCTOBER 1968)

DRAFT FINAL ACT

PRINCIPAL ARTICLES

The undersigned, Delegates of the Governments of Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Jugoslavia, Luxemburg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, The United Arab Republic, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and the Observers of Indonesia, convened at The Hague on the 7th October 1968, at the invitation of the Government of the Netherlands, in the Eleventh Session of the Hague Conference on Private International Law.

Following the deliberations laid down in the records of the meetings, they have decided to submit to the appreciation of their Governments -

A. THE FOLLOWING DRAFT CONVENTIONS -

1

CONVENTION ON THE RECOGNITION
OF DIVORCES AND LEGAL SEPARATIONS

The States signatory to the present Convention,
Desiring to facilitate the recognition of divorces and legal separations obtained in their respective territories,
Have resolved to conclude a Convention to this effect, and have agreed on the following provisions -

Article 1

The present Convention shall apply to the recognition in one Contracting State of divorces and legal separations obtained

in another Contracting State which follow judicial or other proceedings officially recognized in that State and which are legally effective there.

The Convention does not apply to findings of fault or to ancillary orders pronounced on the making of a decree of divorce or legal separation; in particular, it does not apply to orders relating to pecuniary obligations or to the custody of children.

Article 2

Such divorces and legal separations shall be recognized in all other Contracting States, subject to the remaining terms of this Convention, if, at the date of the institution of the proceedings in the State of the divorce or legal separation (hereinafter called 'the State of origin') -

(1) the respondent had his habitual residence there; or

(2) the petitioner had his habitual residence there and <u>one</u> of the following further conditions was fulfilled -

  (a) such habitual residence had continued for not less than one year immediately prior to the institution of proceedings;

  (b) the spouses last habitually resided there together; or

(3) both spouses were nationals of that State; or

(4) the petitioner was a national of that State and one of the following further conditions was fulfilled -

  (a) the petitioner had his habitual residence there; or

  (b) he had habitually resided there for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings; or

(5) the petitioner for divorce was a national of that State and both the following further conditions were fulfilled -

   (a) the petitioner was present in that State at the date of institution of the proceedings and

   (b) the spouses last habitually resided together in a State whose law, at the date of institution of the proceedings, did not provide for divorce.

Article 3

Where the State of origin uses the concept of domicile as a test of jurisdiction in matters of divorce or legal separation, the expression 'habitual residence' in Article 2 shall be deemed to include domicile as the term is used in that State.

Nevertheless, the preceding paragraph shall not apply to the domicile of dependence of a wife.

Article 4

Where there has been a cross-petition, a divorce or legal separation following upon the petition or cross-petition shall be recognized if either falls within the terms of Articles 2 or 3.

Article 5

Where a legal separation complying with the terms of this Convention has been converted into a divorce in the State of origin, the recognition of the divorce shall not be refused for the reason that the conditions stated in Articles 2 or 3 were no longer fulfilled at the time of the institution of the divorce proceedings.

Article 6

Where the respondent has appeared in the proceedings, the authorities of the State in which recognition of a divorce or legal separation is sought shall be bound by the findings of fact on which jurisdiction was assumed.

The recognition of a divorce or legal separation shall not be refused -

(a) because the internal law of the State in which such recognition is sought would not allow divorce or, as the case may be, legal separation upon the same facts, or

(b) because a law was applied other than that applicable under the rules of private international law of that State.

Without prejudice to such review as may be necessary for the application of other provisions of this Convention, the authorities of the State in which recognition of a divorce or legal separation is sought shall not examine the merits of the decision.

Article 7

Contracting States may refuse to recognize a divorce when, at the time it was obtained, both the parties were nationals of States which did not provide for divorce and of no other State.

Article 8

If, in the light of all the circumstances, adequate steps were not taken to give notice of the proceedings for a divorce or legal separation to the respondent, or if he was not afforded a sufficient opportunity to present his case,

the divorce or legal separation may be refused recognition.

Article 9

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.

Article 10

Contracting States may refuse to recognize a divorce or legal separation if such recognition is manifestly incompatible with their public policy ('ordre public').

Article 11

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.

Article 12

Proceedings for divorce or legal separation in any Contracting State may be suspended when proceedings relating to the matrimonial status of either party to the marriage are pending in another Contracting State.

Article 13

In the application of this Convention to divorces or legal separation obtained or sought to be recognized in Contracting States having, in matters of divorce or legal separation, two or more legal systems applying in different territorial units -

(1) any reference to the law of the State or origin shall be construed as referring to the law of the territory in which the divorce or separation was obtained;

(2) any reference to the law of the State in which recognition is sought shall be construed as referring to the law of the forum; and

(3) any reference to domicile or residence in the State of origin shall be construed as referring to domicile or residence in the territory in which the divorce or separation was obtained.

Article 14

For the purposes of Articles 2 and 3 where the State of origin has in matters of divorce or legal separation, two or more legal systems applying in different territorial units -

(1) Article 2, sub-paragraph (3), shall apply where both spouses were nationals of the State of which the terrirotial unit where the divorce or legal separation was obtained forms a part, and that regardless of the habitual residence of the spouses;

(2) Article 2, sub-paragraphs (4) and (5), shall apply where the petitioner was a national of the State of which the territorial unit where the divorce or legal separation was obtained forms a part.

Article 15

In relation to a Contracting State having, in matters of divorce or legal separation, two or more legal systems applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 16

When, for the purposes of this Convention, it is necessary to refer to the law of a State, whether or not it is a Contracting State, other than the State of origin or the State in which recognition is sought, and having in matters of divorce or legal separation two or more legal systems of territorial or of personal application, reference shall be made to the system specified by the law of that State.

Article 17

This Convention shall not prevent the application in a Contracting State of rules of law more favourable to the recognition of foreign divorces and legal separations.

Article 18

This Convention shall not affect the operation of other conventions to which one or several Contracting States are or may in the future become Parties and which contain provisions relating to the subject-matter of this Convention.

Contracting States, however, should refrain from concluding other conventions on the same matters incompatible with the terms of this Convention, unless for special reasons based on regional or other ties; and, notwithstanding the terms of such conventions, they undertake to recognize in accordance with this Convention divorces and legal separations granted in Contracting States which are not Parties to such other conventions.

Article 19

Contracting States may, not later than the time of ratification or accession, reserve the right -

(1) to refuse to recognize a divorce or legal separation between two spouses who, at the time of the divorce or legal separation, were nationals of the State in which recognition is sought, and of no other State, and a law other than that indicated by the rules of private international law of the State of recognition was applied, unless the result reached is the same as that which would have been reached by applying the law indicated by those rules;

(2) to refuse to recognize a divorce when, at the time it was obtained, both parties habitually resided in States which did not provide for divorce. A State which utilises the reservation stated in this paragraph may not refuse recognition by the application of Article 7.

Article 20

Contracting States whose law does not provide for divorce may, not later than the time of ratification or accession, reserve the right not to recognize a divorce if, at the date it was obtained, one of the spouses was a national of a State whose law did not provide for divorce.

This reservation shall have effect only so long as the law of the State utilising it does not provide for divorce.

Article 21

Contracting States whose law does not provide for legal separation may, not later than the time of ratification or accession, reserve the right to refuse to recognize a legal separation when, at the time it was obtained, one of the spouses was a national of a Contracting State whose law did not provide for legal separation.

Article 22

Contracting States may, from time to time, declare that certain categories of persons having their nationality need not be considered their nationals for the purposes of this Convention.

Article 23

If a Contracting State has more than one legal system in matters of divorce or legal separation, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its legal systems or only to one or more of them, and may modify its declaration by submitting another declaration at any time thereafter.

These declarations shall be notified to the Ministry of Foreign Affairs of the Netherlands, and shall state expressly the legal systems to which the Convention applies.

Contracting States may decline to recognize a divorce or legal separation if, at the date on which recognition is sought, the Convention is not applicable to the legal system under which the divorce or legal separation was obtained.

Article 24

This Convention applies regardless of the date on which the divorce or legal separation was obtained.

Nevertheless a Contracting State may, not later than the time of ratification or accession, reserve the right not to apply this Convention to a divorce or to a legal separation obtained before the date on which, in relation to that State, the Convention comes into force.

Article 25

Any State may, not later than the moment of its ratification or accession, make one or more of the reservations mentioned in Articles 19, 20, 21 and 24 of the present Convention. No other reservations shall be permitted.

Each Contracting State may also, when notifying an extension of the Convention in accordance with Article 19, make one or more of the said reservations, with its effect limited to all or some of the territories mentioned in the extension.

Each Contracting State may at any time withdraw a reservation it has made. Such a withdrawal shall be notified to the Ministry of Foreign Affairs of the Netherlands.