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THE LAW COMMISSION

PUBLISHED WORKING PAPER

NO: 28

FAMILY LAW

JURISDICTION IN MATRIMONIAL CAUSES

(other than Nullity)

21 April 1970

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INTRODUCTION

1. Item XIX of our Second Programme, published on 25th January 1968 requires us to undertake a comprehensive examination of family law with a view to its systematic reform and eventual codification. The particular question with which this Paper is concerned is: upon what basis should our courts exercise jurisdiction in matrimonial causes and, in particular in divorce suits? Although we have found it necessary to discuss this at some length we have sought to avoid undue technicality and the voluminous citation of authority. The Paper does not cover jurisdiction in nullity or declaration of status, nor the question of the rules for the recognition by our courts of foreign matrimonial decrees; these will form the subject of later Papers.

2. In addition to discussing the basis on which the English courts should assume jurisdiction, reference will have to be made to the question of "choice of law", i.e. what system of substantive law, as regards grounds and bars, should the English courts apply when they do assume jurisdiction? At present, English courts always apply English domestic law in such cases. Though, as will appear, we do not suggest that this should be changed, it clearly is a question which demands consideration. But the primary question, to which we first turn, is to determine in what circumstances divorce jurisdiction should be assumed.

3. At the outset we wish to acknowledge the most valuable help in the preparation of this Paper given us by Dr. J.H.C.Morris of Magdalen College, Oxford, and by Professor A.E. Anton and Mr A.M. Johnston, Q.C., of the Scottish Law Commission. Though the Paper has been prepared in the closest collaboration with the Scottish Law Commission it has deliberately been drafted in terms of English Law as we understand that the Scottish Commission will circulate their own Paper expressed in terms more familiar to Scottish lawyers.

DIVORCE

THE PROBLEM

4. In the vast majority of divorce cases no jurisdictional problem arises. Both parties will be British subjects and citizens of the United Kingdom, who married in England and have been resident and domiciled in England all their married life. It is only in a minority of cases that a foreign element comes into the picture. But with the ease of foreign travel, the increasing number of persons accepting employment abroad, the influx of permanent or temporary immigrants, and the outflow of permanent or temporary emigrants this minority is growing with some rapidity. The question is: when is the connection with this country of the parties and their marriage sufficiently close to make it desirable that our courts should have jurisdiction to dissolve the marriage?

5. In answering this question one has to look both to the claims of a country to exercise jurisdiction to dissolve a marriage, and to the claims of the parties to a marriage to invoke its jurisdiction to do so. As regards the former, a country might fairly claim that it was entitled to exercise jurisdiction if it was concerned with the broken marriage or was likely to be concerned with its continuance or with the consequences of its dissolution. This suggests that the most appropriate test of jurisdiction should be the non-transient residence of the parties. It is the authorities of the country where the parties are living that will have to deal with such matters as custody of children, financial provision for the wife and children, social security, and, if the parties continue to live there, with the regularising of the subsequent unions of one or both. Again, many countries place great emphasis on citizenship as the determinant of civil status. In such countries a test based on citizenship would be appropriate. As regards the claims of the parties to invoke jurisdiction, a person would expect to be able to invoke the jurisdiction of the courts of the country to which he regards himself as belonging. Here again both residence and nationality are of obvious relevance as indications of belonging. There are, however, many people who still regard themselves as belonging to a country despite the fact that they are not resident there or may not be citizens of it. We have in mind for example,

those expatriates from this country, who, though living abroad sometimes almost permanently, yet regard themselves as "belonging" to England.

DANGERS TO BE AVOIDED

Proliferation of Limping Marriages

6. The expression "limping marriage" has been coined to describe a marriage recognised by one system of law but not by another. There are two extreme views which can be held regarding such marriages. The one is that they matter little and that so long as a person's divorce is recognised where he lives it is of no great importance if it is not recognised in other countries. The other is that jurisdictional criteria and criteria for recognition should be expressly devised to minimise limping marriages.

7. The former view is valid where the parties are not involved with more than two systems of law, that of the forum granting the decree and that of the parties' present residence. The decree will necessarily be recognised by the forum which granted it and so long as it is also recognised in the country where they live, it matters little if it is not recognised elsewhere. But from the nature of situations involving a foreign element there may be a third system of law involved and this system is often relevant to such questions as bigamy, the legitimacy of children and property rights. Whether or not a third system recognises a foreign decree will usually have important repercussions on such questions.

8. Limping marriages have a variety of causes, and it is a mistake to suppose that a prudent choice of jurisdictional rules can itself eliminate all of them. They may occur because some systems of law refuse to recognise divorce at all, or to recognise the divorce of their own nationals or that of persons whose national law does not permit of divorce. They may occur because some systems make the application of the "proper law" a condition of the recognition of foreign decrees and other systems do not, or at least have different views as to what the "proper law" should be in the circumstances of the case. They may occur because a system may recognise foreign divorces only when founded upon grounds known to its own law.

9. Limping marriages, then, will not necessarily be avoided by adopting either narrow rules for the assumption of

jurisdiction or wide rules for the recognition of foreign decrees. Though both these approaches may help to avoid such marriages, they will continue to occur, both for the reasons given in paragraph 8 and because of the different bases of jurisdiction adopted in different systems. All that English jurisdictional rules can fairly be expected to do to minimise limping marriages is not to grant divorces on jurisdictional grounds which are unlikely to be recognised by other countries. The present trouble is not that our existing criteria are unduly lax - they are not - but that they are different from those of most other countries outside the common law world, and are expressed in terms unfamiliar to those countries. These other countries found jurisdiction on criteria based on residence or nationality or both. We base ours on domicil, a concept with refinements of which foreign lawyers are justly suspicious for reasons which will appear. Fortunately this does not add to the sum of limping marriages to any great extent because the vast majority of people domiciled here are also resident here, or United Kingdom citizens, or both; and most countries recognise our divorces if the parties were residents or nationals or both despite the fact that that is not the basis on which we assumed jurisdiction.

Forum-Shopping

10. The danger of "forum-shopping" is often emphasized. Forum-shopping in this context manifests itself in two ways. The first concerns situations where a party resorts to a jurisdiction (Nevada for example) simply to obtain a divorce because divorce is easily obtained there. If English decrees were granted after only a short period of residence, then people might come here to obtain divorces - at any rate so long as the resulting divorces continued to be widely recognised. The second aspect of forum-shopping which has to be considered arises where there is resort to a jurisdiction not because the grounds for divorce are lax but because the financial consequences of a divorce are favourable to a petitioner. We have to be on guard lest the comparatively favourable provisions in English law relating to ancillary relief in connection with matrimonial proceedings should encourage petitioners to resort to the jurisdiction, not so

much to obtain an English divorce as such, but rather for the financial relief obtainable.[1]

11. However, too much importance should not be attached to the dangers of forum shopping. In the first place, most foreigners would find it impracticable to spend longer than a few weeks in England simply to obtain a divorce: social responsibilities and ties of employment prohibit this, except perhaps in the case of a few rich people. In the second place, it is most unlikely that England would suffer from a plague of "migratory divorces", whatever the period of residence necessary to found jurisdiction, so long as a reputable substantive law of divorce is administered by our courts. These courts attempt to do justice between the parties, exercise a quasi-inquisitorial function and operate according to Rules of Court laying down stringent requirements relating to service of process. So long as these features are maintained it is unlikely that England will become a divorce haven.[2]

OBJECTIVES

12. There is much conflicting opinion about the form which the law of jurisdiction in divorce should take. No doubt some of this conflict of opinion is due to differing views as to the fundamental purpose of the rules of divorce jurisdiction. It may be helpful, therefore, if we summarise what we consider to be the main objectives of any rules governing such jurisdiction.

13. (1) The rules should enable relief to be granted to those whose connections with the country are sufficiently close for the marriage and its breakdown to be a matter of real and substantial interest to the country.

(2) They should be such that persons who reasonably regard themselves as belonging to a country should not be excluded by them.

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1. The position which could arise is illustrated by Cammell v. Cammell [1965] P.467 where Scarman J. discussed the discretion of the court to grant such relief.

2. Already, as we shall see, a husband can obtain a divorce here so soon as he settles here permanently and a wife after three years' residence. But this has not led to a flood of wealthy suitors from countries where divorce is unobtainable.

(3) They should not be so wide as to encourage "forum-shopping" whether for the advantage of obtaining divorce or ancillary relief.

(4) They should avoid the creation of hardship and anomalies.

(5) They should avoid, so far as possible, the creation of limping marriages.

(6) The law in this field should be as clearly ascertainable and its practical application as precise as possible. This is far more important than conceptual elegance. A practical solution may have to represent a compromise between many conflicting interests.

THE PRESENT SOLUTION

14. The solution to these problems adopted by English law has been to base jurisdiction in divorce on the domicil of the spouses. To this, certain exceptions are now recognised but the primary principle still is that domicil, and domicil alone, founds jurisdiction. This is a comparatively recent development.

15. Before the Matrimonial Causes Act 1857, matrimonial relief in England was obtainable only in the ecclesiastical courts. They granted either what was called a divorce a vinculo matrimonii, but which was equivalent to the modern nullity, or a divorce a mensa et thoro, equivalent to the modern judicial separation. There was no judicial power to grant a divorce, in the modern sense, dissolving the marriage tie. A true dissolution of marriage was possible only by private Act of Parliament and the practice was to lodge a petition for this with the House of Lords. The House of Lords considered the petition only if a copy of the ecclesiastical courts' sentence of divorce a mensa et thoro on the ground of adultery was first delivered at the Bar of the House. Accordingly, the basis of this parliamentary jurisdiction was dependent on that of the ecclesiastical courts and this was based on residence. The Matrimonial Causes Act 1857 which gave to the English courts jurisdiction to decree dissolution of marriage made no reference at all to the basis of jurisdiction. Between 1857 and 1895 the position was uncertain. In Niboyet v. Niboyet[3] a majority of the Court of Appeal held that residence was

3. (1878) 4 P.D. 1.

sufficient. But in Le Mesurier v. Le Mesurier[4] Lord Watson, giving the advice of the Privy Council, said "according to international law, the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage".[5] Since then this has been the accepted rule.

16. In many respects, domicil has proved a logical and satisfactory concept, more especially for those who are of full capacity. A person is normally domiciled in the country[6] with which he has the closest and most permanent connections. Looked at either from the point of view of the country claiming jurisdiction or from the point of view of the individual expecting to invoke the jurisdiction, the ties of domicil are such that the exercise of jurisdiction based upon it is reasonable. Unfortunately the English concept as developed by voluminous case law has become overloaded with technicalities. In the main these seem to have flowed from a well-meaning, but in retrospect misguided, attempt to ensure that:

(a) everybody has a domicil, and only one at any time, and

(b) each spouse always has the same domicil as the other.

These considerations have led to the concepts of the "domicil of origin", "the revival of the domicil of origin", "the dependent domicil", and the "unity of domicil".

17. Avoiding refinements and undue technicality, it may be said that at birth everyone acquires a domicil of origin, normally the domicil of his father. A male retains this during infancy as a dependent domicil - one which he cannot change though his parents can change it for him. On attaining full age he can change his domicil of origin (or any dependent domicil) to a domicil of choice if he has moved to another country with the intention of settling there permanently, but strong evidence is needed to show the abandonment of a domicil of origin for a domicil of choice. Thereafter he can freely

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4. [1895] A.C. 517, P.C.

5. At 540.

6. Or, strictly, the "law district", where a country has separate legal systems in respect of its component parts.

change his domicil, but if at any time he abandons one domicil of choice without obtaining another domicil of choice his domicil of origin revives. The position of a woman is the same except that on marriage (including a marriage during her infancy) she takes the domicil of her husband and her domicil follows that of her husband should he change it during the marriage.

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

19. Domicil as a sole and exclusive ground of jurisdiction in divorce has long attracted criticism. It is very rigid in its application, it is liable to cause hardship especially for women, and with its technicalities it can give rise to what on the face of things are outlandish results. There is also the uncertainty which flows from the emphasis on intention and from the complexity of the legal rules. In the Appendix we summarise the history of the persistent attempts to reform the law of domicil made by the Private International Law Committee and others. In the light of these abortive attempts, it seems unlikely that any root-and-branch reform of the general law of domicil would be possible at present because of fears, whether or not justified, of the fiscal repercussions entertained by people of overseas origin who live here but are still treated as domiciled abroad. It might, however, prove possible to secure the modification of the relevant rules so far as they relate to matrimonial jurisdiction.

20. A series of statutes[7] has sought to mitigate the more obvious hardships of the strict application of the domicil principle. There are now two extant provisions:

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

(b) The second, introduced by the Law Reform (Miscellaneous Provisions) Act 1949, section 1, is now contained in section 40(1)(b) of the Act of 1965. This enables the wife to petition where she is resident in England and has been ordinarily resident there for three years immediately prior to the commencement of proceedings,[8] provided that the husband is not domiciled in Scotland, Northern Ireland, the Channel Islands or the Isle of Man.

21. These ad hoc extensions of the jurisdiction have produced a singularly untidy result. One of them (section 40(1)(b)) has now made the other (section 40(1)(a)) practically superfluous. In the result a wife may now petition after three years' ordinary residence, whereas a husband petitioner must be domiciled in this country, and cannot even cross-petition if his wife's residence is the only basis of jurisdiction. A wife cannot change the domicil and, unless her husband is domiciled here, must be ordinarily resident here for three years before she can petition; her husband can change the domicil by coming to England with the intention of settling here permanently and either party can petition immediately he does so. For these reasons alone some rationalisation of the rules is required.

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

8. Part of the three years may be before the date of the marriage: Navas v. Navas [1969] 3 W.L.R. 437.

POSSIBLE BASES OF JURISDICTION OTHER THAN DOMICIL AND RESIDENCE

(1) Juriscentre

22. It has long been recognised that a contract containing a foreign element has a "proper law" - that chosen by the parties to govern it or that with which it is most closely connected. This law will govern the interpretation and validity of the contract and the courts of the country of the proper law will generally regard themselves as entitled to assume jurisdiction over disputes arising out of the contract. It has recently been suggested that a similar concept should apply to a marriage, and be used as a test of jurisdiction over it. The neologism "juriscentre" has been invented to describe this concept, which envisages a system of law or a forum with which the marriage or the parties are most closely connected by ties of sentiment and circumstances such as home, family, religion, and nationality. The concept could be applied either to the marriage itself (the closest analogy with the proper law of the contract) or to the parties, or to either of them. It may clarify the concept to examine each of these possibilities.

23. Juriscentre of the marriage. In this sense the meaning of the term probably differs little from that of "home of the marriage", as understood by Scottish law during the second half of the nineteenth century and as revived by Lord Reid in Indyka.[9] However, it would seem anomalous to use a concept analogous to the proper law solely as a jurisdictional criterion. One would expect that the judges would also be required to apply the proper law in determining whether there were grounds for divorce. This question of choice of law is examined more fully below, where the conclusion is reached that it would be highly inconvenient and undesirable to apply foreign law in relation to grounds and bars in divorce suits. Considered solely as a criterion for jurisdiction, there would be little difficulty in applying it if the parties were living together. But in that event it would add little to a residence criterion which would be simpler still to apply. Where the parties were separated it would be necessary for the court to decide where the "home" of the marriage is or had been or with what country the marriage is or had been most closely connected. This would not always be easy. Indeed in some cases it might be impossible

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9. [1969] 1 A.C. 33. See para. 28, below.

to locate the centre of the marriage anywhere. If, for example, a Jamaican resident in England marries a Ghanaian girl by proxy in Gabon and they never live together anywhere, where is the juriscentre of the marriage? If, to enable a Greek girl to obtain British nationality, an Englishman marries her in Turkey but never lives with her, where, again, is the juriscentre? And even if the marriage once had a true juriscentre it is by no means clear why, consistently with the considerations stressed in paragraph 5 above, a long-past connection with a country should serve to give that country a claim to jurisdiction.

24. Common juriscentre of the petitioner and respondent. On this basis the courts would exercise jurisdiction if both the petitioner and the respondent were most closely connected with the country of the forum by ties of sentiment and circumstances such as home, religion and nationality. The difficulty is that in many cases there would be no one forum with which both were thus connected.

25. Juriscentre of the petitioner or of the respondent. It is in this sense that the concept would probably be easiest to apply. But either it would have to be more clearly defined or left to the courts to develop. It would be difficult if not impossible to formulate a statutory definition, giving to various factors such as residence, nationality and religion, appropriate weight. If the concept were left to the courts to develop, certain familiar nuances might well arise, such as the importance to be attached to a juriscentre of origin, the difficulties involved in proof of change of juriscentre and the inconvenience from the judicial standpoint of a wife having a different juriscentre from her husband. It may also be mentioned that one of the main advantages suggested for juriscentre is that everyone would have one and only one. But in the context of divorce jurisdiction there is no particular merit in that unless there is a common juriscentre. That would be achieved if the test were the juriscentre of the marriage or of both parties, but not if it were the juriscentre of either party. The latter test would not prevent limping marriages since, presumably, the country of the wife's juriscentre would not necessarily recognise a divorce granted by the husband's juriscentre or vice versa. Moreover the desirability that everyone should have one juriscentre and no more would arise only if there is to be a single ground of

jurisdiction. If, as at present and as envisaged in the 1968 Hague Convention on the Recognition of Divorces and Legal Separations,[10] alternatives are recognised, it ceases to be a paramount consideration.

26. Conclusion. It is our provisional view that the case for introducing this novel concept into our law has not been made out.

(2) Matrimonial Domicil or Matrimonial Home

27. In the middle of the nineteenth century the Scottish courts adopted the concept of matrimonial domicil (or domicil of the marriage) as the basis of divorce jurisdiction. "But the true inquiry, I apprehend, 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 cohabitation as man and wife?"[11] In Le Mesurier[12] the Privy Council considered this doctrine to be impractical and within a few years the Scottish courts adopted the English doctrine of domicil.[13]

28. In Indyka Lord Reid remarked[14] that "there are many references in English and Scots authorities to the matrimonial home, and matrimonial domicile, and the community with which the spouses are most clearly connected, and with all respect to the board 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 associated". At another stage in his speech he said[15] that he "would in many cases find it easier to say what amounted to a matrimonial home than to say whether there was that animus manendi necessary to create a domicile of choice".

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10. (1969) Cmnd. 3991. Hereafter referred to as "the Hague Convention on Recognition of Divorces".
11. Lord Justice Clerk Inglis in Jack v. Jack (1862) 24 D. 467 at 484.
12. [1895] A.C. 517.
13. Manderson v. Sutherland (1899) 1 F. 621.
14. [1969] 1 A.C. 33 at 67.
15. At 63.

29. This doctrine seems to make an attempt "to locate the 'res' that constitutes the object of the action in rem, as the action for divorce is commonly regarded".[16] As already pointed out it is very similar to the new concept of juriscentre and presents the same difficulties. The last matrimonial home (if ever there was one) may have been abandoned many years before the commencement of proceedings and as time passes it must become increasingly inappropriate. Matrimonial domicil would undoubtedly be of value to some but it would also allow access to the English courts to persons with no great claim. It is our tentative conclusion that on balance it would not, on its own, provide a satisfactory basis for jurisdiction.

(3) Nationality

30. Following the example of the French Civil Code many states have adopted the principle that the status and capacity of a person are governed by the law of his nationality, and, in consequence, exercise jurisdiction in divorce suits on this ground. In some, a residence test is also recognised but there are restrictions designed to safeguard the paramount influence of the law of the nationality as the personal law.[17] Sometimes these restrictions take the form that jurisdiction over foreign nationals is not exercised unless the national law of the parties is willing to recognise the jurisdiction. Sometimes they take the form that divorce is not granted unless the ground for divorce is known to the law of the nationality as well as to the law of the forum. This aspect of the doctrine of "cumulation", as it is called, sometimes involves very complicated problems, especially when the parties are of different nationalities.

31. The fact that, unlike these Continental countries, we do not exercise divorce jurisdiction on the basis of nationality can sometimes lead to hardship. For instance, a French national domiciled in Italy or Spain (where there is no divorce) can always get a divorce in France (if he has grounds), but a citizen of the United Kingdom and Colonies domiciled in Italy or Spain cannot get a divorce anywhere, unless, being the wife, she is in a position to invoke the

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16. See Rabel The Conflict of Laws: A Comparative Study, 2nd Ed., Vol.1., p.428.

17. See Rabel, Vol.1., pp. 419 et seq.

provisions of section 40(1) of the Matrimonial Causes Act 1965. This hardship was recognised by the Royal Commission on Marriage and Divorce, which recommended that the court should have jurisdiction when the petitioner is (a) a citizen of the United Kingdom and Colonies and (b) domiciled in a country the law of which requires questions of personal status to be determined by the law of his national state and does not permit divorce to be granted on the basis of his domicil or residence.[18] Had this recommendation been implemented, it would have been possible for a United Kingdom citizen to obtain a divorce in England or Scotland if he was domiciled in, for example, Italy or Spain, but not if he was domiciled in the Republic of Ireland, where also there is no divorce. This is because Irish law refers questions of personal status to the law of the domicil (not nationality). The Commission justified this distinction on the ground that in the first case the English or Scottish divorce would be recognised in Italy or Spain, but in the second case it would not be recognised in the Republic of Ireland, and would therefore create a limping marriage.[19] The Commission rejected the possibility of allowing the court an unlimited jurisdiction in divorce in respect of United Kingdom citizens on the ground that this "might lead to a great deal of confusion and might be thought to usurp the jurisdiction of the other countries with which England and Scotland are associated ...".[20]

32. The question arises whether the English courts should exercise divorce jurisdiction on the basis of nationality, either to the limited extent recommended by the Morton Commission or in a more general form. There can be no doubt that nationality has the advantage over other possible bases of jurisdiction, and especially over domicil, that it is far more easily ascertained in most cases. This is largely because a change of nationality involves a public act - the governmental act of naturalisation or the celebration of a marriage. Most people know what their nationality is - which is more than can always be said for domicil or any other suggested test. It is one of the few legal concepts that the

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18. Cmd. 9678. See below Appendix, para. 3(d).
19. Ibid. para. 844.
20. Ibid. para. 840.

man in the street feels sure that he knows and the only one of which he has or can easily obtain some documentary evidence - a passport. It is true that there may be cases of double nationality or of statelessness, whereas according to English law every person has one, and only one, domicil. But the only disadvantage of double nationality in this context is that more than one court would have jurisdiction to dissolve the same marriage; and this has been the position in English law ever since the first statutory inroad into the domicil principle was made in 1937.[21] And cases of statelessness would only matter if nationality were the sole basis for exercising divorce jurisdiction. So long as alternative bases continued to exist, they would not be a major problem.

33. Another argument in favour of nationality is that since a change of nationality by naturalisation involves the formal consent of the naturalising State, nationality can be changed less easily than domicil or residence, and therefore forum-shopping would be more difficult. And if, as we have suggested,[22] the concept for which the law should strive is such a relationship between a country and a person that the latter truly belongs to the former, there is much to be said for a criterion which cannot be acquired at will without the concurrence of both.

34. Nationality often indicates the type of relationship between a person and a country which makes it reasonable for the person to ask the courts of that country to determine his or her marital status and for the courts to grant that request. The vast majority of persons do have a close connection with the State of which they are nationals. If "belonging" is the test, nationality clearly counts. On the other hand, nationality will often be an inappropriate test, even more inappropriate than domicil, because immigrants do not always trouble to apply for naturalisation. A United Kingdom citizen, born and bred in England, may emigrate to one of the United States and become domiciled there in the fullest sense of the word, severing all ties with his native land, but without becoming an American citizen. It might be thought inappropriate that the English courts should continue to have jurisdiction to divorce him.

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21. See paras. 20 and 21, above.

22. See paras. 5 and 13(1) and (2), above.

35. Apart from the above considerations there are grave difficulties about applying any nationality test in England, for there is no such thing as English nationality or citizenship. There is only citizenship of the United Kingdom and Colonies. Within the United Kingdom there are three law districts - England, Scotland and Northern Ireland. Moreover, citizenship of the United Kingdom and Colonies embraces a very large number of the indigenous inhabitants of certain present or former parts of H.M. Dominions who have no other connection with the United Kingdom and over whose marriages it would be totally inappropriate for England (or any other part of the United Kingdom) to exercise jurisdiction. Hence it would be necessary to find some formula for excluding these and for including only those who can be said to "belong" to England in some real sense. Attempts have been made in the Commonwealth Immigrants Acts 1962 and 1968 to find an appropriate formula for restricting rights of entry to this country, but we do not think that these attempts would be helpful in defining the sort of connection appropriate for divorce jurisdiction. A further attempt in a somewhat closer context will have to be made as a result of the Adoption Act 1968, which uses the expression "United Kingdom national" and defines it as "a citizen of the United Kingdom and Colonies satisfying such conditions, if any, as the Secretary of State may by order specify ...".[23] However, no such conditions have yet been specified and it would be too much to hope that, when they are, they will be equally fitting for divorce jurisdiction. Certainly we have not been able to devise a workable formula. And even if one could be found it would not assist in distinguishing between the jurisdictions of the several parts of the United Kingdom. The Royal Commission on Marriage and Divorce were equally unable to suggest a solution.[24] The fact is, as it seems to us, that it would not be practicable to introduce citizenship of the United Kingdom and Colonies, however qualified, as a jurisdictional ground until the whole basis of British nationality and United Kingdom citizenship has been re-examined. We may add that nationality is not a basis for divorce jurisdiction in any English-speaking country, not even in New Zealand, a unitary State where the difficulties previously mentioned do not apply.

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23. s.11(1).

24. Cmd. 9678, para. 843.

SUGGESTED GROUNDS OF JURISDICTION

36. We cannot see that the advantages of any of the foregoing bases of jurisdiction would justify their adoption. In our view an improved version of the existing grounds - domicil and, in some cases, residence - would be preferable.

Domicil

37. Despite its artificialities, domicil has worked satisfactorily in the majority of cases and there does not appear to be any strong feeling for its abandonment. It has the great advantage that it is the only jurisdictional criterion which really caters for English expatriates. Where an English couple have gone, say, to Africa to take up a business or professional assignment there, they clearly should not be denied access to our courts. They have a continuing interest in England and we have a continuing interest in them and their children. Moreover the country where they reside may have no court to which they can resort in relation to their matrimonial affairs. To deny them resort to the English courts unless they resumed residence in England would be unfair. No residence test could meet this need unless mere presence in England were to be the ground of jurisdiction and that would obviously open the door too widely.

38. Domicil has long been accepted in the Commonwealth and other English-speaking countries, both as a ground for jurisdiction and as an important concept in other connections. It is with these countries that we have at present the greatest interchange of population. While domicil in our sense is not the basis of jurisdiction in Continental countries, it is a concept with which they are now familiar and Article 3 of the Hague Convention on the Recognition of Divorces deems the expression "habitual residence" to include domicil where a state uses the concept of domicil as a test of jurisdiction. Hence our divorces granted on the basis of domicil will qualify for recognition under that Convention. To this, however, there is an important exception; the married woman's dependent domicil is expressly excluded.

Wife's separate domicil

39. The case made for the unity of the domicil of husband and wife is that it is convenient to treat both as having the same domicil. How far this is true in contexts other than those of matrimonial jurisdiction is a question which we cannot explore in this Paper - though we may, perhaps, be permitted to express our doubts whether it is truly convenient for the administrators of the estate of a wife, separated from her husband for many years, to have to trace the husband to ascertain where he (and therefore she) was domiciled at the time of her death.[25] Be that as it may, it is, no doubt, convenient for the husband if divorce proceedings can be taken only in the country where he is domiciled, and if he, and he alone, can freely change his domicil. It is certainly not convenient - or just - to the wife. The unity of domicil may also be regarded as convenient in that it reduces the number of law districts that might have jurisdiction to dissolve the marriage; clearly if domicil is the sole jurisdictional test and both parties must have the same domicil (that of the husband) there can be only one law district having jurisdiction at any one time. However that advantage, if such it be, can be achieved only at the expense of grave injustice to the wife when, de facto, she is settled somewhere else; hence the justification for Lord Denning's dictum that the rule is "the last barbarous relic of a wife's servitude".[26] And the injustice is so great and so obvious that, as we have seen, it has had to be mitigated by allowing a wife to found a petition on grounds other than domicil. Thereby whatever advantages there may be in ensuring that only one law district can have jurisdiction have been destroyed.[27]

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25. Succession to movable property is governed by the law of the deceased's domicil.

26. Gray (orse Formosa) v. Formosa [1963] P. 259 at 267.

27. Subject only to this, that inter-U.K. conflicts of jurisdiction are avoided by the proviso to s.40(1)(b) of the Matrimonial Causes Act 1965, which provides that the wife cannot proceed under that paragraph if the husband is domiciled elsewhere in the U.K. or in the Isle of Man or the Channel Islands. For this aspect of the matter, see paras. 70-80 below.

40. Not only is the doctrine of the unity of the husband's and wife's domicil capable of causing grave injustice to the wife, and is therefore understandably unpopular among women's organisations, it is also criticised as ignoring the principle of sex equality embodied in Article 16(1) of the Universal Declaration of Human Rights. Nor is it surprising that it should be disliked by foreign courts and lawyers. If, say, a French girl marries a man domiciled in England and the parties live throughout the marriage in France, it is understandable that the French courts should recoil from recognising an English divorce granted on the basis that the wife is domiciled in England because the husband has retained his domicil there. Hence, as we have seen, the new Hague Convention on Recognition of Divorces expressly provides that although recognition shall be given to divorces based on domicil this does not include the wife's dependent domicil.[28] Nor is this recoil limited to lawyers in the Civil Law countries. It has long since been recognised throughout the United States of America that a married woman may have a separate domicil at any rate for the purposes of matrimonial jurisdiction, and in recent years a similar rule has been adopted by statute in a number of Commonwealth countries.[29] Unless we follow suit soon,[30] we are in danger of being the last country to cling to an obviously anachronistic and unjust rule.

41. We should emphasize that all that is being suggested is that for purposes of matrimonial jurisdiction a wife should be treated as capable of acquiring a domicil separate from that

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28. The apparent effect of this is that, so long as we cling to the doctrine that a wife can have only a domicil dependent on that of her husband, no recognition need be given to English decrees which fulfil the criteria of the Convention only because of the wife's domicil.

29. For example, Australia (now Matrimonial Causes Act 1959, s.24), New Zealand (Matrimonial Proceedings Act 1963, s.3) and Canada (Divorce Act 1968, s.6(1)). The Bill proposed for Kenya as a result of joint consultations between the Commissions on the Law of Succession and the Law of Marriage and Divorce allows the wife an independent domicil for all purposes: see Report of the Commission on the Law of Succession (Govt. Printer Nairobi, 1968) para. 219 and Appendix V.

30. As recommended in 1954 in the First Report of the Private International Law Committee and in 1955 by the Royal Commission on Marriage and Divorce: see Appendix.

of her husband. In the overwhelming majority of cases the wife's domicil is, de facto as well as de jure, the same as that of her husband and that would continue to be so irrespective of the state of the law. The suggestion is simply designed to deal with the exceptional cases which cause hardship where the wife at present is treated as domiciled where her husband is domiciled notwithstanding that the parties are separated and the wife has settled somewhere else. In such cases the attribution to the wife of the husband's domicil is a useless fiction.

42. While there is reason to fear that any general attempt to reform the law of domicil would encounter obstacles, it does not follow that there would be the like resistance to altering the rule whereby the wife is deemed for all purposes to have her husband's domicil. Especially is this so if the reform were limited to the wife being granted an independent domicil for the purpose of founding jurisdiction in matrimonial proceedings - which is all we are able to recommend in this Paper.[30A] Indeed, it would then not be necessary to make any change in the law of domicil as such, but merely to provide, as in New Zealand and Canada,[31] that the court should have jurisdiction if the wife would have been regarded as domiciled here but for the fact that she was a married woman. There is no reason to fear that this could lead to any of the complications which the Private International Law Committee, in their Seventh Report,[32] feared might flow from a provision that a married woman could acquire a separate domicil for all purposes.[33] It does not seem to have done so in the Commonwealth countries which have already adopted this limited solution.

43. It may be argued that so long as there is an alternative residence test there is no need to accord the wife a right to proceed on the basis of domicil. But the present residence test and that which we recommend later pre-suppose a recent period of past residence. Domicil caters for a different

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30A. We envisage, however, that it would apply to <u>all</u> matrimonial proceedings, including nullity although we are not dealing in this Paper with the grounds of jurisdiction in nullity: see para. 1 above.

31. The Australian formulation is somewhat different, see Matrimonial Causes Act 1959, s.24.

32. See Appendix.

33. The Committee did not consider the proposal that it should be limited to matrimonial proceedings: Cmnd. 1955, para. 23.

class - those who, whether or not they have recently resided in England for any length of time, retain a connection with England and intend to return or remain there in the future. In particular it caters for the English expatriate. There are women expatriates as well as men. If, for example, an Englishwoman employed as a teacher in Africa, but with an English domicil, marries in Africa an American Peace Corps volunteer, she should be entitled to divorce him in England if the marriage breaks down and not be forced to chase him to the United States. To say that after a period of resumed residence in England she could proceed there on the residence ground is not an adequate answer; her job in Africa may well prevent her from doing that.

44. In short, there seems to be everything in favour of, and nothing serious against, allowing a wife to have a domicil separate from her husband's for the purposes of matrimonial jurisdiction.

The Married Minor

45. The question of the married minor also requires consideration. Part I of the Family Law Reform Act, implementing the recommendation of the Latey Committee,[34] has, as from 1st January 1970, reduced the age of majority from 21 years to 18 years,[35] and all persons (other than married women) are able to acquire an independent domicil at the age of 18.[36] The effect of our proposal would, of course, be to remove the exception of married women so far as concerns matrimonial relief. In addition, however, it seems to us that there are strong arguments for allowing an independent domicil to be acquired on or after marriage. Sixteen not eighteen is the age at which a valid marriage can be contracted and, although it is true that parental, or other, consent is still required between the ages of 16 and 18, the marriage is valid in the absence of such consent and it is not difficult to contract a

34. Report of the Committee on the Age of Majority; (1967) Cmnd. 3342, Part I.

35. s.1.

36. Cmnd. 3342, paras. 499-504.

marriage without obtaining it.[37] It seems anomalous to allow a minor to contract a valid marriage but to deny him or her the power to acquire an independent domicil for the purposes of founding jurisdiction to dissolve that marriage.[38] Furthermore it is difficult to see how sensible results can be achieved if this power is denied; in the case of a married girl a domicil dependent on her parents is likely to be more unreal than a domicil dependent on her husband. Hence, some Commonwealth countries which by statute have allowed married women to acquire an independent domicil have expressly provided that where they are minors their domicil shall be determined as if they were adults.[39] But to allow a girl to acquire an independent domicil and to deny that right to a boy would introduce a novel sex discrimination. It seems to us that all married minors should be able to acquire a domicil independent of that of their parents' domicil.[40] Such a rule might provide a reasonable basis for a unification in this respect of the laws of England and Scotland.[41]

46. Accordingly we provisionally propose that a minor of either sex on or after marriage, should be enabled to acquire a domicil independent of that of his or her parents. We can see no reason why this should be restricted to domicil for the purposes of matrimonial jurisdiction; there are no policy considerations in favour of ensuring that a married minor's domicil is that of his parents.

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37. The Latey Committee say "we feel it is desirable that any loopholes by which those under 18 can circumvent the need for consent should be closed": Cmnd. 3342 para. 504. This is a matter which we are looking into in relation to our study of the Law of Marriage. The loopholes could certainly be narrowed but it is doubtful whether they could be closed completely short of invalidating marriages contracted without consent.

38. It is true, of course, that under English law a divorce will not normally be obtainable until the marriage has lasted for three years. But that is possible in cases of exceptional hardship or the respondent's exceptional depravity: Matrimonial Causes Act 1965, s.2.

39. See, for example, s.3(1) of the Matrimonial Proceedings Act 1963 of New Zealand and s.6(1) of the Divorce Act 1968 of Canada.

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

41. In certain circumstances a Scottish minor (i.e. a boy over the age of 14 or a girl over the age of 12) may be able to acquire an independent domicil: see Cmnd. 3342, Appendix 5, III, para. 7.

47. We appreciate that the recommendations in the immediately foregoing paragraph may appear to go further than those of the Latey Committee. But we do not think that there is any conflict of policy. The Committee indicated that they had received little evidence on the question of domicil;[42] they dealt with it very briefly, and were concerned only with what the age should be for obtaining the power to change domicil. They were not concerned with and did not discuss the effect of marriage on domicil. We do not think that they would have regarded it as inconsistent with their views if minors when married were empowered to change their domicil.

Residence

48. We have shown that, while domicil is generally an appropriate basis for jurisdiction, some amelioration of its harsh results is required and that this can be achieved by giving a wife the right to an independent domicil. But domicil only meets the needs of parties intending to make a country their permanent home. It does not meet the needs of those who have been living in a country for some time but whose future intentions are either uncertain or are to move elsewhere when their present broken marriage is dissolved. The country where they now are and where the marriage was centred, quite as much as the country where they are legally domiciled, may be concerned to tidy up the mess left by the broken marriage and to deal with such matters as the custody of the children, the maintenance of the wife and children, and the property rights of the parties. To some extent this need is met in the case of the wife by section 40(1)(b) of the Matrimonial Causes Act 1965 which entitles her to petition if she has ordinarily been resident in England for three years. But because that was not the purpose for which it was designed (it was, as already pointed out, simply intended to mitigate the hardship that she could not have a separate domicil) it meets the need only imperfectly. What is wanted is a more suitable residence test and one which does not discriminate between the husband and the wife.

49. It seems clear that simply to base jurisdiction on the present residence of the parties would be unacceptable. To allow courts to dissolve a marriage merely because of the

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42. Cmnd. 3342, para. 499.

transient presence in the country of one or both of the parties would fail to satisfy the first, second, third and fifth objectives set out in paragraph 13 and, in particular, would lead to the possibility of forum-shopping on an unacceptable scale. The problem is to find a means of defining a type of residence which can fairly be regarded as providing a sufficiently close connection with the country to justify the assumption of jurisdiction.

50. There are five main ways in which, it has been suggested, this might be done:-

(1) By using the expression "home" rather than "residence".

(2) By adding a further jurisdictional test as a reinforcing factor.

(3) By qualifying "residence" by attaching an adjective which would show that what is required is something more than a temporary sojourn.

(4) By requiring proof of an intention to continue the residence in the future.

(5) By requiring that residence shall have lasted for a prescribed period.

51. (1) Use of "home". The use of the expression "home" rather than residence was suggested by the Private International Law Committee in their First Report.[43] Like domicil (and it was in the context of a definition of domicil that their suggestion was made) it connotes an element of intention and accordingly adds some element of permanence which is lacking in simple residence. But, for our present purposes, it adds the wrong element. Cases where there is an intention to reside in the future are catered for by the domicil test. What we are seeking is an element based on the present and past rather than on intention for the future. Moreover, one objection to domicil as a sole test is precisely the uncertainty which flows from the emphasis on intention. If there is to be an alternative test it should, if possible, be free from this defect. But "home" is an imprecise term open to a variety of interpretations according to its context and to the disposition of the hearer.[44] Accordingly this

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43. See below Appendix, para. 2.

44. Cf. Re Brace dec'd. [1954] 1 W.L.R. 955 at 958 and Herbert v. Byrne [1964] 1 W.L.R. 519 at 528.

method of overcoming the dangers of simple residence seems to us to be unsatisfactory.

52. (2) Use of a reinforcing factor. Under the second possibility, the test of residence would be supplemented by, for example, nationality or last matrimonial home. We can see little merit in this solution. We have already rejected these criteria as independent tests and our objections to them apply equally to their use as reinforcing factors.

53. (3) Use of a qualifying adjective. We are equally dubious about the third suggestion, under which, instead of talking about residence one would refer, for example, to "ordinary" residence or "habitual" residence, or "permanent" residence. The last of these seems obviously objectionable as suggesting an intention to settle at least as strong as that required for a change of domicil. If, as we have suggested, domicil is retained as a criterion and if, as we have also suggested, married women and married minors should be enabled to change their domicil as if unmarried and adult, permanent residence would add little if anything. Habitual residence and ordinary residence are free from this particular defect but, in our view, the qualifying adjectives are unsatisfactory unless related to residence for a period in the past or to intention for the future. It provides a clear and workable test, to say, as section 40(1)(b) of the Matrimonial Causes Act 1965 says, that someone "has been ordinarily resident [in England] for a period of three years". It would make equally good sense if "habitually" were substituted for "ordinarily". Either would make sure that the person concerned had ordinarily or habitually been resident here during those three years: i.e. that continuous uninterrupted presence was not needed so long as he had normally been resident here. It would make equally good sense to talk about an intention "ordinarily" or "habitually" to reside here. But to refer simply to a present "ordinary" or "habitual" resident would necessarily introduce an uncertain element since both past behaviour and future intentions would appear to be relevant. That this is the intention of those responsible for recent international Conventions[45] in which the expression "habitual

45. For example, in the Hague Convention on Recognition of Divorce and in the Conventions which led to the Wills Act 1963 and the Adoption Act 1968 in which the expression is used.

residence" is used seems clear from the draft recommendations of the Council of Europe's Sub-Committee on Fundamental Legal Concepts.[46] The mere use of either expression would be to condemn the public and their legal advisers to uncertainty and consequent litigation in a field where certainty is most desirable. Moreover, it would necessarily introduce an element of future intention which, as already emphasized, is not what is wanted in the present context.

54. (4) Proof of a continuing intention. The fourth possible answer is to require an intention to continue residence indefinitely. If one were looking for a test to replace domicil this would have some attractions especially if formulated as proof of the absence of any present intention to reside elsewhere than in England. A negative test of this sort would obviate difficulty in the case of those of unsound mind who are incapable of forming an intention. It would retain the element of stability and indefiniteness which the concept of domicil contains but which residence simpliciter lacks. It would enable people who have settled here to obtain a divorce without a waiting period. But even as a substitute for domicil it would have a number of disadvantages. In the first place parties would be encouraged to swear that they had no intention to reside elsewhere whether that was true or not. At a time when the law relating to grounds and bars to divorce is being reformed in a way which should reduce deception and perjury, it would be particularly unfortunate to reform the jurisdictional criteria in a way which would encourage those evils. Secondly, it would not provide for the resident from abroad who has no intention of presently residing elsewhere but who does have a present intention of residing elsewhere at some future time. Many foreigners are brought to England by their jobs and expect to be here for a number of years but to return thereafter. This, perhaps, is

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46. "9. In determining whether a residence is habitual, account is to be taken of the duration and the continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence.
10. The voluntary establishment of a residence and a person's intention to maintain it are not conditions of the existence of a residence or an habitual residence, but a person's intentions may be taken into account in determining whether he possesses a residence or the character of that residence."
On the uncertainty of the expression, see Dicey and Morris Conflict of Laws, 8th Ed. p.598, F.A. Mann in (1968) 17 I.C.L.Q. at 531 and Lipstein in [1965] Cam. L.J. 224 where, at p.226 he points out that the term is unknown in continental law except in Germany where its meaning is disputed.

unimportant since it can be argued that they have no very strong claim to invoke our divorce jurisdiction. What is more serious is that it would exclude a woman who has long been resident here but who intends to emigrate, for example to marry an American, if she obtains a divorce. Her marriage up to now may have been exclusively connected with England and it seems to us to be right and proper that she should be able to invoke the jurisdiction of the English courts to dissolve her dead marriage. Finally, and most serious of all, it would not cater for the expatriate who is not presently resident here. Hence it seems clear that it would not be an adequate substitute for domicil. As an additional test alternative to domicil it clearly fails for the same basic reason as the previous possibilities. As emphasized, we are not looking for a test based upon intention for the future (domicil takes care of that) but for one based on the present and past residence.

55. (5) Requiring a period of past residence. It is our provisional conclusion that only a test on these lines could achieve the object that we are seeking. The test should follow the existing precedent of section 40(1)(b) of the Matrimonial Causes Act 1965 but with adaptations so as to make it applicable to both husbands and wives. In other words the residence ground of jurisdiction should be the residence in England at the commencement of the proceedings of one or other of the spouses, coupled with the requirement that he or she had resided there during a prescribed period preceding that commencement.

The Suggested Residence Test

56. Three questions arise:

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

(2) For how long should the required residence be?

(3) How should the past residence be described?

The first two questions are inter-related because of the problem of forum-shopping. If the residence of the petitioner alone suffices and if the period of required residence is short, there is a greater risk of undesirable forum-shopping than if the respondent or both respondent and petitioner are required

to be resident here or if the period of required residence is relatively long. Indeed forum-shopping really arises only if jurisdiction is based on the residence of the petitioner alone.[47] If a foreigner, by the simple process of taking up residence here, can obtain a divorce not obtainable in his own country, he may be tempted to move here for this purpose.[48] If, however, jurisdiction is based on the residence of the respondent or of both petitioner and respondent, forum-shopping arises only when both parties are acting in concert - admittedly a not unlikely eventuality. But, as already pointed out,[49] too much importance should not be placed on the problem of forum-shopping since it can hardly be a serious one so long as English law is not lax in its grounds for divorce.

57. Under the Hague Convention on Recognition of Divorces,[50] the criteria entitling decrees to recognition include:

(a) The respondent's habitual residence in the State granting the decree; or

(b) The petitioner's habitual residence there plus the fact that:

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

(ii) the spouses last habitually resided there together.

It will be observed that the residence of either petitioner or respondent suffices but that one of two additional conditions has to be complied with in the case of the petitioner's residence. The first of these conditions is habitual residence for one year; the second the fact that the last joint residence was there. There are in the Convention further recognised grounds of jurisdiction based primarily on nationality, and if the petitioner is a national

47. See Tursi v. Tursi [1958] P.54.

48. Assuming, and it is a big assumption, that he can afford to do so and that he can obtain a residence permit.

49. See para. 10 above.

50. It should be emphasized that this Convention is not yet in operation and has not yet been ratified by any of the parties to it.

of the State granting the decree it suffices if he is presently habitually resident there or was habitually resident there for one year falling in part within the last two years.

58. Accordingly the Convention fully recognises, what is also recognised by section 40(1)(b) of the English Act, that it is not desirable to base jurisdiction solely on the residence of the respondent or of both respondent and petitioner. To do so would enable the respondent to deny relief to the petitioner by shifting his home to a distant country where the petitioner has not the means to follow; or by taking refuge in a country like Italy, Spain or the Republic of Ireland where there is no divorce; or by simply disappearing. True, it may seem hard that the respondent should be divorced on a ground which, perhaps, is not a ground for divorce by his or her personal law, and perhaps ordered to pay maintenance to the petitioner and be deprived of the custody of the children. But this may equally well occur under the present English law and has to be accepted as the lesser of two possible hardships.

59. A further point is of some relevance; if a distinction were drawn between the residence of the petitioner and that of the respondent a problem would arise regarding cross-petitions. It is obviously unsatisfactory that, as under the present English law,[51] when a wife petitions on the ground of her residence, the husband cannot cross-petition. This, however, could be solved by providing that the courts should always have jurisdiction to entertain a cross-petition if it had jurisdiction to hear the original petition.[52]

60. Having regard to the above considerations we answer the first question posed in paragraph 56 by saying that jurisdiction should be based on the residence of either the petitioner or the respondent.

61. That brings us to the second question: for how long should the petitioner or respondent be required to have been resident here prior to the institution of the proceedings? If the analogy of the present section 40(1)(b) were followed the answer would be three years. But in our opinion the analogy is imperfect. The period of three years' residence

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51. See para. 21, above.

52. This is accepted by Article 4 of the Hague Convention on Recognition of Divorces.

by the wife was chosen to mitigate the hardship caused by the fact that she could not acquire a separate domicil and the period was envisaged as one which would be sufficiently long to be a substitute for domicil. The intention of our provisional proposals is to provide a test alternative to domicil and available for both husband and wife. The question therefore is not: how long a period of residence is an equivalent to domicil? But: how long a period of residence suffices to show such a connection with England as to make it reasonable and proper, consistent with the considerations stressed in paragraph 13, for the English courts to assume jurisdiction over the marriage?

62. That being so, our provisional answer would be one year. In our view a person who has ordinarily resided in England for not less than one year can fairly be said to have established a sufficiently close connection with this country. We are unimpressed with the argument that this will lead to a flock of immigrants seeking to take advantage of our divorce facilities (and Legal Aid Scheme). Apart from anything else, immigration controls are now sufficiently strict to prevent that. Many of those who can obtain permission to reside here for 12 months and can afford to do so will be outside the Legal Aid limits. The immigrants most likely to be within those limits are students, and to lengthen the period to exclude them (and why should they be excluded?) would mean making it more than three years (the normal duration of a University course). In our view it is unsatisfactory to prescribe a long delay merely for jurisdictional purposes. If there are grounds for a divorce and one of the parties is ordinarily resident here it is generally in the public interest (English public interest) that the marriage, if dead, should be dissolved and appropriate orders made regarding financial provision and custody of children. Of course it by no means follows that, because one party has been here for 12 months and wants a divorce, there will be grounds. If the ground relied on is desertion it will, under the present law, have to have lasted for three years. When the Divorce Reform Act comes into operation on 1st January 1971 the minimum period of desertion or separation will be two years. Hence, if the desertion or separation did not begin until one of the parties came to this country a longer delay than one year will have to elapse when desertion or separation alone is relied on. But

to make people wait before their broken marriage can be dissolved is justifiable only to the extent that time is needed to make it clear that the marriage has in fact broken down. And delay for the purpose of satisfying jurisdictional requirements is justifiable only if it is needed to establish that there is an adequate connection with the country concerned. In both cases, and especially in the latter, the delay should be as short as possible. Not only can delay cause hardship to the parties and the children, it can also interfere with the due administration of justice since it may be impossible to arrive at the truth if evidence has grown cold because witnesses have died, disappeared or forgotten.

63. We are encouraged in our belief that one year is the correct period by the fact that it is the period which, after lengthy debate, has been finally selected as the appropriate period of habitual residence under the recently adopted Hague Convention on Recognition of Divorces.[53]

64. The final question is how the required period of residence should be described so as to indicate that it is not enough that a person has made his occasional residence in a place, but that, on the other hand, a stable residence should not be excluded because the person in question has occasionally left it for business or pleasure. The present section 40(1)(b) is formulated as "resident in England and has been ordinarily resident there for a period of ...". This in principle seems to us to be the desirable formula. 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 40(1)(b), the courts have sometimes sought guidance from cases interpreting the concept of "ordinary residence" in the Income Tax legislation. It has been recognised that the problems in the two domains are different and in general the result which we would wish to achieve has in fact been reached in interpreting section 40(1)(b). Nevertheless weight has sometimes been attached to a dictum of Viscount Cave L.C. in Levene v. Inland Revenue Commissioners:[54]

"I find it difficult to imagine a case in which a man while not resident here is yet ordinarily resident here". Such an

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53. See para. 57, above.

54. [1928] A.C. 217 at 225.

assimilation of the ideas of "residence" and "ordinary residence" would not point to that stability of relationship with a place which is appropriate to a criterion of divorce jurisdiction. We conclude, therefore, that it would be better to prescribe that the residence should be "habitual". We are fortified in this view by the fact that the concept of "habitual residence" has been widely adopted in recent European Conventions and, in particular, in the Hague Convention on the Recognition of Divorces. The use of "habitually" rather than "ordinarily" should make it more likely that our decrees will secure recognition in countries ratifying the Convention. The concept has already found a place in our law in the Wills Act 1963 and in the Adoption Act 1968.

65. If the ground of jurisdiction were to be that either the petitioner or the respondent was resident in England at the commencement of the proceedings and had habitually been resident there during the immediately preceding 12 months, then, if we ratify the Hague Convention on Recognition of Divorces, our decrees would almost invariably be entitled to recognition in other countries which ratify. We are also satisfied that most Continental countries, whether or not they ratify the Convention, would nearly always recognise our decrees based on this criterion; they would certainly do so if the parties were U.K. citizens.

66. What is perhaps of greater practical importance is whether our decrees would continue to secure recognition in other Commonwealth countries. Most of these - and indeed most of the common law countries generally - now follow the rule in Travers v. Holley,[55] i.e. they recognise a foreign decree if granted in circumstances in which they themselves would exercise jurisdiction. For a while, jurisdiction based on residence for one year would be more liberal than the criteria at present recognised in many of them. But, just as a ground of jurisdiction based on three years' residence by the wife has become virtually universal, so, it is likely, will jurisdiction based on one year's habitual residence. Apart from anything else, the general agreement secured to the terms of the Hague Convention points in that direction. Initially there may be a risk that decrees based solely on

55. [1953] P.246, C.A.

one year's residence will not secure recognition throughout the Commonwealth, and in cases where this is the sole ground of jurisdiction and the parties are connected with an overseas Commonwealth country they may be well-advised to wait for more than one year before petitioning here. But this is not a valid reason for refusing to exercise jurisdiction on a basis which this country considers right and proper. If we denied a divorce unless satisfied that it would have universal recognition we should never grant any divorces at all. In many cases, of course, the divorce will secure recognition, if not on the basis of residence, then on the basis of domicil or nationality.

Conclusion

67. Accordingly our provisional conclusion is that the English courts should have jurisdiction, in addition to that based on domicil, if either the petitioner or the respondent is resident here when the divorce proceedings are commenced and has habitually been so resident during the 12 months immediately preceding their commencement. This conclusion is provisional and we shall welcome views on it, particularly on whether 12 months is the right period.

68. If the foregoing recommendation is adopted - or, indeed, even if it is not - we think that the powers of the court to stay proceedings when suits are being pursued in two or more countries should be clarified and strengthened. At present the English courts have power to stay the English suit (or, indeed, to restrain the party from pursuing the foreign suit) but this is a power which they exercise with great caution, especially when one spouse is the petitioner in the English suit and the other the petitioner in the foreign suit.[56] The

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56. See Orr-Lewis v. Orr-Lewis [1949] P.347 and Sealey (orse Callan) v. Callan [1953] P.135. In Christian v. Christian (1897) 67 L.J. (P) 18, the wife who was petitioning for judicial separation in England was granted an injunction restraining her husband's proceedings for divorce in Scotland. But it is thought that the circumstances would have to be very unusual for this case to be followed today. It is understood that the N.Irish courts have the like power. In Scotland there is a similar doctrine known as forum non conveniens but the Scottish courts seem reluctant to apply this doctrine in matrimonial cases and unwilling to stay proceedings in Scotland if the husband is domiciled there: see Anton, Private International Law, pp. 148-154, and Balshaw v. Balshaw 1967 S.C. 63.

risk that England will not be the most convenient forum will be increased if our recommendation is implemented and accordingly we think that it should be made clear that if proceedings relating to the marriage of the parties[57] are pending[58] elsewhere it should be the duty of the petitioner in the English proceedings to refer to them in the petition. We also think that it should be provided that the court should at any stage stay the proceedings before it, either of its own motion,[59] or on the application of either party if

(a) proceedings relating to the marriage of the parties are pending elsewhere,[60] and

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57. In any legislation this may require detailed description which we do not attempt at the present stage. We intend to include proceedings for dissolution or nullity and also, for example, proceedings by a third party asking for a declaration of the validity of a marriage between him and one of the parties. We also think that proceedings in the nature of judicial separation should be disclosed, since, although the existence of these would rarely cause the court to stay divorce proceedings, it might be convenient to do so if they raised similar issues, for example, whether there was desertion.

58. Although for present purposes it is only pending proceedings which appear to be relevant, we suggest that when the new Matrimonial Causes Rules come to be drafted consideration should be given to requiring disclosure of all past or pending proceedings relating to the marriage and whether in England or elsewhere. Under the present Matrimonial Causes Rules 1968 disclosure of foreign proceedings is not required (r.9(2) and Form 2, para. (4)) unless the wife is relying on s.40(1)(b) to found jurisdiction, when proceedings pending abroad have also to be disclosed: r.9(4)(b). In practice it is normal to disclose in the petition all such proceedings and it seems obviously desirable that the court should be informed of them.

59. We do not envisage that the court would normally stay except on the motion of the respondent but it might be appropriate for it to have power to do so, for example, if nullity proceedings have been instituted elsewhere. Indeed, unless it is to have this power there seems little point in requiring the petitioner to disclose other proceedings since an objecting respondent can be relied upon to do so (unless, of course, he is ignorant of them).

60. Such proceedings would not necessarily be those referred to in the petition in accordance with our immediately foregoing recommendation. The power to stay would equally be exercisable where, say, after the petitioner had instituted divorce proceedings in England the respondent started nullity proceedings in Scotland.

(b) the court considers that in all the circumstances it would be preferable for those proceedings to be disposed of first.

We would hope that this would lead to a greater readiness to stay proceedings and that it would adequately take care of conflicts of jurisdiction, except perhaps in relation to conflicts between courts in the various parts of the United Kingdom, a problem to which we turn in the next section of this Paper.

69. We can now summarise our provisional conclusions over the whole field in this way:

(a) The English courts should have jurisdiction in divorce proceedings where at the commencement of proceedings:

(i) either party is domiciled in England,

(ii) either party is resident in England and has habitually been so resident during the twelve months immediately preceding the commencement of proceedings,

and where they have jurisdiction should also have jurisdiction to entertain a cross-petition for divorce (or other matrimonial relief)[60A] notwithstanding any change of domicil or residence since the commencement of the original proceedings.

(b) For the purpose of matrimonial jurisdiction the domicil of a married woman should be determined independently from that of her husband, and on or after marriage a minor should be able to acquire an independent domicil.

(c) The petitioner should be required to disclose in the petition any proceedings relating to the marriage of the parties pending elsewhere.[61]

(d) The court should stay divorce proceedings before it if proceedings relating to the

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60A. Although we are not dealing in this Paper with jurisdiction in nullity (see para. 1 above), it seems clear that this should include proceedings for nullity.

61. Or, indeed, past proceedings: see footnote 58, above.

marriage of the parties were pending elsewhere and the court considered that in all the circumstances it would be preferable for those proceedings to be disposed of first.

CONFLICTS OF JURISDICTION IN THE U.K.

70. At present jurisdictional criteria in England, Scotland and Northern Ireland are virtually identical and they are such that the likelihood of two suits proceeding simultaneously in two or more countries is very small. The only grounds of jurisdiction are (i) the husband's domicil and (ii) the wife's residence for three years so long as the husband is not domiciled in another part of the United Kingdom.[62] This does not wholly avoid the possibility of conflicts of jurisdiction, since the courts of different parts of the United Kingdom may take different views of where the parties are domiciled; nor does it completely prevent forum-shopping since, in undefended cases, the petitioner's allegation that the parties are domiciled within the jurisdiction may escape question. Nevertheless, conflicts of jurisdiction in suits to dissolve a marriage are reduced to a minimum. And when they occur their consequences are not serious since the grounds of divorce are virtually identical in all three countries.[63]

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62. Or in the Channel Islands or the Isle of Man: Matrimonial Causes Act 1965 s.40(1)(b)(ii). In England, the wife has an additional ground of jurisdiction under s.40(1)(a) where the husband was domiciled in England immediately before he deserted her or was deported. Under that paragraph there is no exception in the case of a domicil elsewhere in the U.K.

63. As regards the financial powers of the court on a divorce, here too, since the Succession (Scotland) Act 1964, s.26, there has been substantial uniformity, although professional opinion seems to be that the Scottish courts exercise their powers somewhat less generously than the English. While this does not seem to have led to any discernible forum-shopping there is some evidence of that in nullity cases where the Scottish courts have no power to award financial provision. There is a risk that this may spread to divorce when the Matrimonial Proceedings and Property Bill, now before Parliament, comes into operation in England and thus produces significant differences between England and Scotland and N.Ireland. The other difference between the three countries is that the English qualified ban on divorce within 3 years of the marriage does not apply at all in Scotland and applies in N.Ireland only to divorce on the ground of cruelty alone; there is, however, no evidence that this has led to any migration by petitioners from England.

71. If the basis of divorce jurisdiction is widened as suggested above, and especially if there are similar changes in Scotland 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 domicil or one year's residence of either the petitioner or the respondent there will 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 England and the other in Scotland; or one or both may be resident in England and the other or both may be domiciled in Scotland; or one may be resident in England but domiciled in Northern Ireland and the other resident or domiciled in Scotland. 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 suits pending in more than one of those countries with the same spouse as petitioner or, more probably, with the other spouse as petitioner.

72. As already pointed out in paragraph 68, conflicts of jurisdiction are equally likely to arise as between England and countries outside the United Kingdom and we have there recommended that, to minimise them, the powers of the court to stay proceedings should be clarified and widened. However, these powers will not necessarily prevent two or more suits proceeding contemporaneously in different countries and it is arguable that this is particularly objectionable within a relatively small and compact unit like the United Kingdom. Hence, it is also arguable that stricter rules are needed to prevent conflicts of jurisdiction within that unit. If all three parts of the United Kingdom had substantially the same substantive law of divorce and the same jurisdictional criteria (as they have at present) it would be relatively easy for all those countries to adopt rules which would prevent such conflicts. These rules could be regarded not as affecting jurisdiction but merely the allocation of business among the various courts of the United Kingdom having jurisdiction and exercising what, in effect, would be a common law of divorce.

73. On the assumption that uniformity of substantive law[64] and jurisdictional criteria could be preserved, the first rule to prevent conflicts of jurisdiction should, it is suggested, be that a spouse who has served or been served with[65] a petition for divorce (or nullity) instituted in one part of the United Kingdom should not be permitted to serve a petition for divorce[66] in another part until the first proceedings have been stayed or disposed of. This would in itself ensure that suits did not proceed simultaneously in more than one part of the United Kingdom. On the other hand an unqualified rule of "first-come, first-served" might well be regarded as unduly rigid. This is not so much because of the possibility of undesirable forum-shopping, for there would not be much inducement to indulge in that if the law were the same in all three countries. Rather it is because it is an arbitrary rule, without logical basis, which would encourage spouses to compete with each other for first place in presenting a petition in the country most convenient for the petitioner.

74. Hence, it is further suggested that the rule proposed in paragraph 73 might be supplemented by another which would secure that, so far as possible, proceedings were brought in that part of the United Kingdom with which the marriage is most closely connected. Retention of the present rule, that within the United Kingdom the courts of the husband's domicil have exclusive jurisdiction, would not secure this, since the husband's domicil, if different from the residence of the parties, is unlikely to be closely connected with the marriage. Moreover, it would make nonsense of the proposed concession whereby a wife would be allowed, for purposes of matrimonial jurisdiction, to have a separate domicil; it would mean that the concession applied only to the relatively unusual case where the husband was domiciled abroad and had no application

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64. This must include substantial identity of financial consequences as well as of grounds and defences: see footnote 63, above.

65. We suggest service, rather than filing, of the petition, thus adopting for this purpose the Scottish rule that proceedings are not deemed to commence until process is served.

66. Whereas service of nullity proceedings in one part should preclude institution of divorce proceedings in another part until the nullity proceedings had been stayed or disposed of, divorce proceedings in one part should not, per se, preclude nullity proceedings in another. We are not in this Paper dealing with jurisdiction in nullity cases, but it seems obvious that a U.K. court having jurisdiction in nullity should be allowed to dispose of a suit to annul the marriage before a court in another part deals with the question of dissolution.

to the much more common case where he was domiciled in the United Kingdom. But what would secure the end desired is a rule requiring the court to stay proceedings on the application of the respondent,[67] if satisfied that:-

(a) the respondent was not domiciled in that part of the United Kingdom and had not been habitually resident there during the previous 12 months; and

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

(c) another part of the United Kingdom had jurisdiction on the basis that the respondent was resident there and had habitually been resident there for the preceding 12 months.

In other words, if the respondent was neither resident nor domiciled in the jurisdiction and the last matrimonial home was not there and if another part of the United Kingdom had jurisdiction based on the respondent's habitual residence, the respondent would be entitled, if he wished, to have the proceedings stayed.[68] Either party would then be at liberty to institute proceedings in the other part of the United Kingdom.[69] But the respondent would not be entitled to have the proceedings stayed if he was domiciled or habitually resident in the jurisdiction or if the parties last lived together in the jurisdiction; in any of these events that forum is likely to be closely connected with the marriage.

75. As we see it, the advantages of a rule such as that suggested in the immediately foregoing paragraph are that it

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67. We suggest that, except with special leave, the application would have to be made within, say, 6 weeks of service of the petition.

68. It is possible that the respondent, resident, say, in Scotland, having successfully objected to proceedings in England might leave Scotland thus depriving the Scottish courts of jurisdiction. In that event the petitioner's remedy would be to apply to lift the stay on the English proceedings.

69. And the courts of that other part should be precluded from exercising its power to stay proceedings under the rule suggested in para. 68 or this rule.

would provide a definite rule with readily ascertainable conditions enabling solicitors to advise with reasonable certainty which forum was appropriate. And a fair result would normally be achieved by entitling a respondent to insist that proceedings be brought in that part of the United Kingdom where he was resident unless he was domiciled elsewhere in the United Kingdom or the parties last lived together in another part of the United Kingdom. Like any rigid rule, inconvenience might be suffered in exceptional circumstances,[70] but these, we think, would be rare.

76. Accordingly, if, in respect of all three countries of the United Kingdom, there were (a) uniformity of jurisdictional criteria, (b) uniformity of the substantive law and (c) uniform rules for avoiding conflicts of jurisdiction, we think that the suggestions in paragraphs 73 and 74 would form a desirable basis for the rules required under (c). But we cannot assume that all three conditions will be speedily fulfilled. After 1st January 1971 condition (b) - a uniform divorce law - will not be fulfilled in all three countries and it would be unrealistic to assume that it soon will be. Failing that, we do not think that the rules suggested in paragraphs 73 and 74 would operate justly. If, for example, Northern Ireland did not adopt provisions comparable to those in the English Divorce Reform Act 1969 it would mean that a husband, resident in Northern Ireland and not domiciled in England, could prevent the wife from obtaining a divorce in England based on 5 years' separation[71] notwithstanding that the wife had lived in England for many years.[72] That would be so even though the husband

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70. For example, in a case such as the following: W, domiciled in England, married H. domiciled in N.Ireland but employed by an English firm in W. Africa where the parties lived and had children. Their marriage broke up because of the husband's cruelty and his adultery with another Englishwoman - some of the acts of adultery being in a London hotel. W and the children then returned to her parents in England and H returned to N.Ireland. Once the husband had been resident there for a year he would be entitled to prevent the wife from taking divorce proceedings in England notwithstanding that that would be manifestly more just and convenient than forcing her and all the witnesses to go to N.Ireland.

71. Divorce Reform Act 1969, s.2(1)(e).

72. Unless the last matrimonial home was in England.

was not domiciled in any part of the United Kingdom (or in the Channel Islands or the Isle of Man) so that the wife would be in a worse position than under the present jurisdictional rules.

77. The question, therefore, arises whether, failing uniformity of grounds of divorce, it is either practicable or desirable to attempt to minimise conflicts of jurisdiction more effectively than under the general provision recommended in paragraph 68. On the one hand, it may be argued that, failing uniformity, the need is still greater since there will then be a serious risk of forum-shopping. On the other hand, it may be said that if England has adopted what it regards as the appropriate grounds of divorce and the appropriate jurisdictional criteria, there can be no justification for denying use of those grounds by those who fulfil the criteria. It certainly seems to us that it would be highly objectionable to deny resort to our courts to petitioners married to Scotsmen or Northern Irishmen, while extending it to petitioners married to foreigners; discrimination of this sort would appear to be totally unacceptable. Further, it would seem that the only practicable way of strengthening the rule proposed in paragraph 68 would be to confer on the court a discretion to stay proceedings, whether or not proceedings were already pending elsewhere, if it thought that the courts of another part of the United Kingdom would be a more appropriate forum. There are grave objections to the conferment of such a discretion. It would, in effect, force the court to conduct a trial within a trial in order to determine which forum seemed to be more appropriate. This it would have to do without knowing to what extent the allegations in the pleadings could be sustained and, necessarily, with an imperfect knowledge of the law and procedure in the other jurisdiction.[73] These difficulties would be aggravated if, in order to determine where it would be more just for the proceedings to be heard, the court was required to evaluate the substantive laws of its own and other systems. The results would be unpredictable and would inevitably vary from judge to

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73. Cf. Babington v. Babington 1955 S.C. 115 especially at 117 and 122.

judge.[74] The problems might be reduced if the factors to which the judge was entitled to have regard were arbitrarily restricted (for example to the residential and domiciliary connections of the parties and the convenience of witnesses) but that would force the judge to pretend to shut his eyes to what he would necessarily regard as a highly relevant factor, namely whether it was possible for either party to obtain a divorce in the other jurisdiction.

78. We have found this problem a difficult one but in the end we have felt forced to the conclusion that, in the absence of substantial uniformity in the substantive laws, the possibility of conflicts of jurisdiction and of forum-shopping within the United Kingdom has to be accepted as the lesser of two evils, and that any attempt to strengthen in relation to the United Kingdom the rule proposed in paragraph 68 would be impracticable. We have little doubt, however, that when proceedings are actually pending in another part of the United Kingdom the court will be more ready to stay proceedings before it than it would if the pending proceedings were in a totally alien jurisdiction. Hence the most distasteful feature, suits proceeding simultaneously in different parts of the United Kingdom, should not be a frequent occurrence.

79. If, however, uniformity of jurisdictional criteria and substantial uniformity of substantive law were achieved, we would then favour rules on the lines of those suggested in paragraphs 73 and 74. If, as seems not unlikely, substantial uniformity is in the near future achieved as between England and Scotland only, we see no reason why these suggested rules should not apply as between the courts of Great Britain. Equally, if at a later date, such uniformity were achieved in regard to the whole United Kingdom, or, indeed the whole of the British Isles (i.e. including the Channel Islands and the Isle of Man), we see no reason why these rules should not be extended to cover them. But at present all we, as an English Law Commission, can do is to make recommendations regarding the rules to be applied by the English courts and,

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74. A judge who favoured the idea of divorce based on five years' separation would inevitably be more ready to allow the continuance of proceedings in England for a divorce on this ground than would one who regarded it with disfavour.

at present, we have to assume that as from 1st January 1971, when the Divorce Reform Act 1969 and the Matrimonial Proceedings and Property Bill will come into operation, there will not be substantial uniformity between these countries. Nor can we assume that all will adopt the same jurisdictional criteria.[75] Accordingly our present, provisional, conclusion is that no special rules can be recommended with a view to minimising further the possibility of jurisdictional conflicts between them.

80. To sum up our provisional conclusions:-

(1) Unless and until there is uniformity of jurisdictional criteria and substantial uniformity of the substantive laws of divorce between the countries of the United Kingdom, no special rules can be recommended to strengthen the general rule proposed in paragraph 68 so as to reduce still further the possibilities of conflicts of jurisdiction and forum-shopping.

(2) If and when such uniformity is achieved between two or more such countries it would be desirable that the countries concerned should adopt the following rules for the allocation of business between the courts administering what, in substance, would be a common divorce law -

(a) A spouse who has served or been served with a petition for divorce (or nullity) instituted in one such country should not be permitted to serve a petition for divorce in another such country until the first proceedings had been stayed or disposed of.
(Paragraph 73).

(b) The court should be required to stay divorce proceedings on the application of the respondent if satisfied that:-

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75. As already mentioned, this Paper has been prepared after consultation with the Scottish Law Commission which will be circulating its own Paper making similar recommendations. Both Commissions will consult the Director of Law Reform, N.Ireland, on their respective Papers.

(i) the respondent was not domiciled in its jurisdiction and had not habitually been resident there during the 12 months preceding the petition; and

(ii) the place where the spouses last habitually resided together was not in its jurisdiction; and

(iii) another such country had jurisdiction on the basis that the respondent was resident there and had habitually been resident there during the 12 months preceding the petition.

(Paragraph 74).

CHOICE OF LAW

81. There is a further ancillary question which needs to be discussed: should English courts continue to apply English domestic law in divorce proceedings despite the fact that the marriage was a foreign one and that the personal laws of the parties are foreign? While the husband's domicil was the only basis upon which English courts assumed divorce jurisdiction, the question whether the petitioner's or the respondent's personal law should be applied could not arise. The law of the forum was English, the law of the domicil was English and the personal law of the husband (and therefore of the wife) was English. When section 13 of the Matrimonial Causes Act 1937 introduced a basis of jurisdiction wider than domicil (permitting a deserted wife whose husband is not domiciled in England to sue in certain circumstances), it was silent on whether the English courts should apply English law or the law of the husband's domicil. It was assumed that English law would be applied, and in Zanelli[76] the Court of Appeal confirmed this by holding that a deserted wife whose husband was domiciled in Italy, where there is no divorce, was able to obtain a divorce in England (though the question whether English law should be applied was apparently not raised). Section 1(4) of the Law Reform (Miscellaneous Provisions) Act 1949, now re-enacted as section 40(2) of the Matrimonial Causes Act 1965, provides that in any

76. Zanelli v. Zanelli (1948) 64 T.L.R. 556.

proceedings in which the court has jurisdiction by virtue of section 40(1), the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the commencement of the proceedings, i.e. English law.

82. Now that the possibility is being considered of further extending the grounds of jurisdiction it is necessary to examine whether English law should continue to be applied to the exclusion of foreign law. Let us take an example. An Italian marries an American girl and they come to live in London. He is working here and they make a home here, although he is not domiciled here in the English sense of the term. The marriage breaks down, the English court assumes jurisdiction on the basis of residence. It will be heard, if undefended, in a county court. Should English law be applied - either as the law of the forum or as the law of the matrimonial home? Should Italian law (which prohibits divorce) be applied? Should the law of some State in America be applied? Should there be some cumulation of the various laws? If so, is it a cumulation of English law with the Italian law and that of some State in America, or is it merely a cumulation of English law with only one of the personal laws? If the latter, then how is the choice made? And what is the precise meaning for lawyers of a cumulation? Does the personal law include the private international law of the personal law? If so, how is any renvoi[77] treated? Yet this example is a relatively straightforward one.

83. Four things appear clear. The first is that it must be conceded that the argument that if a connecting factor is sufficient to ground jurisdiction, it is sufficient to justify the suit being determined by the law of the forum, is not a compelling one in theory. The second is that to apply the personal law might discourage forum-shopping and render it more likely that the decree would receive recognition in other countries. The third is that nevertheless it would be highly inconvenient and undesirable from the practical point of view to apply foreign law as to grounds and bars in divorce suits; that is shown by the example cited in paragraph 82. Moreover, to require the petitioner to lead evidence of foreign law in

77. A highly technical doctrine dealing with the situation where the law of country A applies the law of country B which, in turn applies the law of country A or C.

an undefended divorce case would be a serious obstacle to the swift and inexpensive administration of justice. The fourth is that to require English courts to dissolve the marriage of parties connected with this country by applying alien concepts, such as mental cruelty, injure grave, or incompatibility of temperament, would be regarded by many people as undesirable even if it were practicable.

84. It is our strongly held view that practical considerations must prevail and that, notwithstanding the theoretical arguments to the contrary, the grounds of, and defences to, a divorce suit heard in this country must continue to be those of English law. This, of course, does not mean that consideration of other laws is totally ignored in such proceedings. In determining whether there is a marriage to dissolve both the law of the place of celebration (as regards formalities) and the personal laws of the parties (as regards capacity) may be relevant. In deciding whether conduct is cruel, the mores of the parties' foreign community may possibly have to be considered. But in deciding what are the grounds for divorce and what are the defences or bars to the grant of a decree, English courts must, in our view, continue to apply English domestic law exclusively.

OTHER MATRIMONIAL PROCEEDINGS

85. As already stated, we are leaving for later consideration the vexed question of jurisdiction in nullity cases and it will be more convenient then to deal with decrees for declaration of legitimacy under section 39 of the Matrimonial Causes Act 1965, with petitions for declarations as to status under R.S.C. Ord.15, r.6, and with jactitation of marriage should that somewhat obsolete suit be retained. There are, however, a number of other matrimonial proceedings which need to be dealt with in the present Paper. Here, too, the grounds for, and defences to, these proceedings should continue to be governed exclusively by English (domestic) law for reasons given in paragraphs 81-84. Those reasons are equally applicable to these proceedings - though not to nullity.

Judicial Separation

86. Under existing law the court has jurisdiction to entertain proceedings for judicial separation:

(a) where both parties are domiciled in England;[78]

(b) where both parties[79] are, or the respondent alone,[80] is, resident[81] in England;

(c) in the case of proceedings by a wife, where the wife has been deserted by the husband or where the husband has been deported from the United Kingdom and the husband was, immediately before the desertion or deportation, domiciled in England.[82]

Ground (a) was introduced by judicial decisions as part of the development of the concept of domicil as a basis for matrimonial jurisdiction. Ground (b) has a purely historical basis, in that this was the ground on which the ecclesiastical courts exercised their jurisdiction and that jurisdiction was transferred by statute[83] to the Divorce Court. Ground (c) was first introduced by the Matrimonial Causes Act 1937, section 13 to enable a wife, who could not bring herself within ground (a) or (b), because her husband had left England and changed his domicil, to bring matrimonial proceedings including proceedings for judicial separation. Thus, in the case of judicial separation, unlike divorce, the courts were never shackled to the concept of domicil as the sole jurisdictional basis for entertaining proceedings.

87. We do not regard judicial separation as presenting the same problem in the jurisdictional field as that presented by divorce. In divorce the marriage bond is severed, so that each party undergoes a change of status from being married to becoming single again, and in those circumstances there should be such a

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78. Eustace v. Eustace [1924] P.45.

79. Graham v. Graham [1923] P.31.

80. Sinclair v. Sinclair [1968] P.189, 199.

81. Continuous presence is not essential; a party, though physically abroad, may be regarded as still resident in England: Sinclair v. Sinclair, above.

82. Matrimonial Causes Act 1965, s.40(1)(a).

83. Matrimonial Causes Act 1857, s.22; Supreme Court of Judicature (Consolidation) Act 1925, s.32.

connection between the parties (or one of them) and England as to make it reasonable and proper for the English courts to assume jurisdiction over the marriage. Whether or not a change of status takes place on a decree of judicial separation,[84] the parties remain husband and wife, the marriage tie continues, and the effect of the decree can be wiped out at the will of the parties. Indeed, one of the reasons advanced by the Morton Commission[85] for retaining this remedy was the need for proceedings which would keep open the door for the possibility of subsequent reconciliation. We, therefore, do not find any reason for departing from the existing principle that residence in England is of itself a sufficient basis for giving the court jurisdiction without any additional requirement that the residence should have continued for some specified period. Petitions for judicial separations are comparatively few[86] and, so far as we know, it has not been suggested that residence per se as a ground for jurisdiction has been unsatisfactory or subject to abuse. Moreover, residence per se enables a spouse to obtain in the magistrates' court a separation order,[87] which has the effect of a judicial separation.[88] We propose, therefore, that residence, at the institution of the proceedings, of both parties or of the respondent should remain a ground of jurisdiction in proceedings for judicial separation. We do not suggest that mere residence[89] of the petitioner should suffice, if only because that would be inconsistent with the

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84. In Eustace v. Eustace [1924] P.45, 51, 54, C.A. and Thompson v. Thompson [1957] P.19, 38, C.A. it was said that judicial separation affected status, but this was doubted in Armytage v. Armytage [1898] P.178, 190-191 and Anghinelli v. Anghinelli [1918] P.247, 254, 256, C.A.

85. Report of Royal Commission on Marriage and Divorce (1956) Cmd. 9678, para. 303.

86. In 1968 there were about 54,000 petitions for divorce and only 233 petitions for judicial separation: Civil Judicial Statistics, Cmnd. 4112, pp. 56, 57.

87. Matrimonial Proceedings (Magistrates' Courts) Act 1960, s.1(2)(a). But not if the defendant resides in Scotland or N.Ireland: s.1(3) proviso, and, as regards maintenance orders, see s.1(3)(a).

88. Ibid., s.2(1)(a).

89. But see para. 88 regarding residence sufficient to ground jurisdiction in divorce.

provisions in the Matrimonial Proceedings (Magistrates' Courts) Act 1960 designed to preclude the English courts from making a separation order against a respondent resident in Scotland or Northern Ireland.[87] If, however, the court has jurisdiction because of the respondent's residence, it should equally have jurisdiction to hear a cross-petition for judicial separation.

88. We also propose that the court should have jurisdiction whenever it would have jurisdiction in divorce. As the Morton Commission[90] pointed out, one of the reasons why it is necessary to retain the remedy of judicial separation is in order to provide relief, where proper grounds exist, during the first three years of the marriage, and, thereafter, for those who have religious or conscientious objections to divorce. Consistently with our proposals for divorce, we therefore suggest that the court should also have jurisdiction to hear a petition for judicial separation if the petitioner is resident in England, and has habitually been so resident during the preceding 12 months or if either party is domiciled in England, a wife for this purpose being entitled to acquire a domicil different from that of her husband. If this is accepted, then the statutory ground in the case of a wife who has been deserted or whose husband has been deported (see paragraph 86) becomes superfluous.

Restitution of Conjugal Rights

89. In our Report on Restitution of Conjugal Rights[91] we have recommended the abolition of this remedy and this recommendation will be implemented when the Matrimonial Proceedings and Property Bill,[92] now before Parliament, passes into law. Accordingly this remedy can be ignored.

Neglect to Maintain

90. Under section 22 of the Matrimonial Causes Act 1965 a wife may apply for periodical payments if the husband has been guilty of wilful neglect to provide reasonable maintenance for her or a child.[93] In our report on Financial Provision[94] we recommended

90. Cmd. 9678 paras. 301 to 303.

91. Law Com. No.23.

92. Clause 20.

93. See also s.35 under which sums may be payable direct to a child or to another person on its behalf.

94. Law Com. No.25, paras. 18-22, 43 and 44.

certain amendments to this section, including its extension so that the husband could apply in certain circumstances. These recommendations will be implemented when the Matrimonial Proceedings and Property Bill[95] becomes law. Both the present section 22[96] and clause 6[97] of the Bill which will replace it, state that the court has jurisdiction where it would have jurisdiction to entertain proceedings for judicial separation. Since the remedy is purely financial and does not affect in any way the status of the parties, the case for founding jurisdiction on residence is even stronger than in the case of judicial separation. We accordingly propose that the existing nexus with the grounds for jurisdiction in judicial separation should be maintained. This means that no legislative change will be needed.

Variation of Maintenance Agreements

91. Under sections 23-25 of the Matrimonial Causes Act 1965, the court is empowered to vary the financial arrangements made in a maintenance agreement. In accordance with the recommendations made in our Report on Financial Provision,[98] these sections will be replaced in modified form by clauses 13-15 of the Matrimonial Proceedings and Property Bill. Under section 25 the court has jurisdiction to order a variation after the death of the party liable to pay if he died domiciled in England, and this will not be changed by the Bill.[99] But the present rule in other circumstances is that the court has jurisdiction only when the parties are both domiciled or both resident in England.[100] The Bill proposes to alter this so that the court will have jurisdiction if each of the parties is either domiciled or resident. In other words, it will suffice if one is resident

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95. Clause 6.

96. s.22(1)(b).

97. Clause 6(2).

98. Law Com. No.25, paras. 94-96.

99. Clause 15(1).

100. s.24(1). A magistrates' court has jurisdiction only when both parties are resident in England and one resident in the petty sessional area of the court: s.24(2). The Bill will not alter this (see clause 14(3)) and we do not in this Paper consider the question of jurisdiction of magistrates' courts which will be the subject of a general review later.

and the other domiciled here and it will no longer be necessary either that both be resident or that both be domiciled here.

Presumption of Death and Dissolution

92. Under section 14 of the Matrimonial Causes Act 1965, it is possible to petition the court to presume that the other party to the marriage is dead and to dissolve the marriage (thus protecting those involved in case the other party proves in fact to be alive). Although such a decree, like divorce, dissolves the marriage, it is not technically divorce. However it so closely resembles divorce as to be virtually indistinguishable and the present grounds of jurisdiction are in essence the same as those for divorce; i.e. the petitioner's domicil, or, in case of a petition by the wife, three years' residence. It is expressly provided that in determining whether a woman is domiciled in England, her husband shall be treated as having died immediately after the last occasion on which she knew or had reason to believe him to be living.[1] These rules, as the Scottish Law Commission have pointed out in their Memorandum No.11 on Presumptions of Survivorship and Death are open to objections similar to those applying to divorce. In particular it seems wrong that a husband, however long he may have resided in England, cannot have recourse to the English courts unless he is domiciled here. It also seems undesirable that a wife of English origin, married to a person domiciled abroad, cannot obtain relief in England unless she returns and resides here for three years. The general similarity between petitions for this type of dissolution of marriage and petitions for divorce suggests that in the former, equally with the latter, a petitioner should be able to found jurisdiction on the domicil of either party[2] or on residence for at least 12 months. This would make unnecessary the special exception in favour of wives in the present section 14.[3] One possible objection to this is that the

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1. s.14(5). This further provides that where the proceedings are brought on the basis of the wife's residence for three years, the issues shall be determined "in accordance with the law which would be applicable thereto if both parties to the marriage were domiciled in England at the time of the proceedings". This is equivalent to saying that English domestic law shall apply, which is, of course, the view which we favour: see paras. 81-85.

2. i.e. the wife's separate domicil should be recognised in accordance with our suggestions in paras. 39-44, above.

3. s.14(5), above.

present domicil and residence of the respondent (and his continued existence) will necessarily be unknown. But this could be met on the lines of the existing provision by providing that his last known domicil (and, perhaps, residence) should be deemed to continue. We see no point in so providing as regards residence, but we do suggest that the last known domicil of the spouse should be a ground of jurisdiction. We make this suggestion because the administration of, and succession to, his movable property will be governed by the law of his domicil, and accordingly a court in that country seems an appropriate forum to presume his death. It seems to us unfortunate that, at present, a decree under section 14 of the Matrimonial Causes Act 1965 is not treated as proof of death for probate purposes,[4] but we would hope that, sometime in the future, it might be possible to introduce a procedure which would obviate the need for a separate application for leave to swear to the death when applying for probate after obtaining a decree under section 14. We, accordingly, propose that the English courts should have jurisdiction if, (a) at the commencement of proceedings, the petitioner is domiciled in England, or, (b) the petitioner is resident in England, having been habitually resident there during the 12 months preceding the commencement of the proceedings, or (c) if the last known domicil of the respondent was English.

Conflicts of Jurisdiction

93. The problems of conflicting jurisdictions and of forum-shopping are not so grave in relation to the miscellaneous actions considered in this section of the Paper as they are in relation to divorce. Nevertheless they can arise, and just as we have made it clear that we envisage that the English courts might stay divorce proceedings in the light of foreign proceedings other than those for divorce,[5] so we envisage that they should be empowered to stay any of these miscellaneous suits having regard to pending foreign proceedings. They clearly have such a power at present and in our view the suggestions in paragraph 68 should equally apply to such suits.[6]

4. Tristram & Coote's Probate Practice 23rd Ed. p.558.

5. See para. 68 above.

6. If and when substantial uniformity of matrimonial law were achieved between two or more countries of the United Kingdom (or British Isles) stricter rules (on the lines suggested in paras. 73 and 74) might well be adopted regarding the allocation of business between their respective courts.

SUMMARY OF PROVISIONAL CONCLUSIONS

94. Our conclusions, which are provisional and will be reconsidered in the light of comments received, are:-

Divorce

(1) The English courts should have jurisdiction if either the husband or the wife is:

(a) domiciled in England at the commencement of the proceedings (paragraphs 37-47), or

(b) resident in England at the commencement of the proceedings and has habitually been resident in England during the 12 months immediately preceding the commencement of the proceedings (paragraphs 48-67),

and where they have jurisdiction should also have jurisdiction to entertain a cross-petition for divorce (or other matrimonial relief) notwithstanding any change of domicil or residence since the commencement of the original proceedings (paragraph 59).

(2) For this purpose, the domicil of the wife should be determined independently of that of her husband (paragraphs 39-44) and that of a minor who is or has been married should be determined as if he or she were an adult (paragraphs 45-47).

(3) The petitioner should be required to disclose in the petition any proceedings relating to the marriage pending elsewhere (whether in the United Kingdom or abroad) and the court should stay the English proceedings if it considers that in all the circumstances it would be preferable for the foreign proceedings to be disposed of first (paragraph 68).

(4) Unless and until there is uniformity of jurisdictional criteria and substantial uniformity of the substantive laws of divorce between the countries of the United Kingdom no additional special rules can be recommended so as to reduce still further the possibilities of conflicts of jurisdiction and forum-shopping (paragraphs 70-80).

(5) But if and when such uniformity is achieved between two or more countries of the United Kingdom (or British Isles) it would be desirable that the countries concerned should adopt the following rules for the allocation of business

between the courts administering what, in substance, would be a common divorce law:-

(a) A spouse who has served or been served with a petition for divorce (or nullity) instituted in one such country should not be permitted to serve a petition for divorce in another such country until the first proceedings had been stayed or disposed of (paragraph 73).

(b) The court should be required to stay divorce proceedings on the application of the respondent if satisfied that:-

(i) the respondent was not domiciled in its jurisdiction and had not habitually been resident there during the 12 months preceding the petition; and

(ii) the place where the parties last habitually resided together was not in its jurisdiction; and

(iii) another such country had jurisdiction on the basis that the respondent was resident there and had habitually been resident there during the 12 months preceding the petition.
(Paragraph 74).

(6) The grounds and defences should continue to be exclusively those of English (domestic) law (paragraphs 81-84).

Miscellaneous Matrimonial Proceedings

(7) The English courts should have jurisdiction to hear proceedings for judicial separation when (a) the respondent is resident in England at the commencement of the proceedings in which event they should also have jurisdiction to hear a cross-petition by the respondent or (b) when they would have jurisdiction to hear a petition for divorce (paragraphs 86-88).

(8) The grounds of jurisdiction to hear an application for maintenance based on neglect to maintain should continue to be the same as those for judicial separation (paragraph 90).

(9) The English courts should have jurisdiction to hear proceedings for the variation of maintenance agreements

if each of the parties is either domiciled or resident in England at the commencement of the proceedings (paragraph 91).

(10) The English courts should have jurisdiction to hear a petition to presume the death of the respondent and to dissolve the marriage if (a) at the commencement of the proceedings the petitioner is, domiciled in England, or (b) the petitioner is resident in England and has habitually been resident in England during the 12 months immediately preceding their commencement or (c) the last known domicil of the respondent was English (paragraph 92).

(11) As with divorce, the domicil of the wife should be determined as if she were unmarried, a rule which should apply to all matrimonial proceedings but not in other branches of the law (paragraphs 39-44), and the domicil of a minor who is or has been married should be determined as if he or she were an adult, a rule which should apply to all branches of the law (paragraphs 45-47).

(12) The petitioner or applicant in these proceedings should be required to disclose any proceedings relating to the marriage proceeding elsewhere (whether in the United Kingdom or abroad) and the court should be empowered, having regard to those proceedings, to stay or dismiss those in England (paragraph 93).

(13) As with divorce, these proceedings should continue to be governed by English (domestic) law (paragraph 85).

APPENDIX

PREVIOUS ATTEMPTS

TO REFORM LAW OF DOMICIL

The First Report of the Private International Law Committee[7]

1. In 1952 this Committee, then under the chairmanship of Wynn Parry J., was asked to consider (inter alia) "what amendments are desirable in the law relating to domicile, in view especially of the decisions in Winans v. Attorney General [1904] A.C. 287 and Ramsay v. Liverpool Royal Infirmary [1930] A.C. 588."

2. The Committee, in its Report dated January 1954, suggested certain amendments to the law of domicil and annexed to the Report a draft Code of the Law of Domicile. The following are the more important features of the Report:

(a) The Committee recommended no change in the requirement that to acquire a fresh domicil of choice a person of full capacity must intend to reside in a country permanently,[8] although a minority of the Committee considered that the intention need be only to reside for an unlimited time.[9]

(b) The draft Code set out three presumptions,[10] the most important of which was that "where a person has his home in a country, he shall be presumed to intend to live there permanently." Thus the person asserting a change of domicil would no longer have to show an intention to remain permanently in the country in which a new home had been established: the burden of proof would be upon his opponent to rebut the

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7. Cmd. 9068.

8. Draft Code, Article 2(1).

9. p.5, para. 7. cf. Russell v. Russell and Roebuck [1957] P.375, 379; Re Fuld (No.3) [1968] P.675, 684, 685.

10. Draft Code, Article 2(2).

presumption which would arise from the establishment of the home.

(c) The draft Code abolished the doctrine of revival of domicil of origin and provided that "a domicile, whether [of] origin or of choice, shall continue until another domicile is acquired".[11]

(d) The Committee thought it desirable to maintain the unity of domicil between husband and wife,[12] subject to the exception that a woman "who has been separated from her husband by the order of a court of competent jurisdiction[13] should be able to acquire a separate domicile".[14]

(e) The draft Code provided that a male infant who had married should be as free to change his domicil as an adult.[15]

The Report of the Royal Commission on Marriage and Divorce (The Morton Report)[16]

3. Part XII of the Morton Report deals with the basis of matrimonial jurisdiction and the recognition of the jurisdiction of other countries. Appendix IV to the Report consists of a draft Code embodying the Commission's recommendations. The Commission recommended that the court should have jurisdiction to pronounce a decree of divorce in four circumstances:-

(a) when the petitioner is domiciled in England,[17] the wife who is living separate and apart from her husband being enabled to acquire an independent domicil for the purpose of invoking the court's matrimonial jurisdiction;[18]

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11. Draft Code, Article 1(5).
12. p.9, para. 7(i).
13. This would presumably include an order of a magistrates' court if it contained a non-cohabitation clause.
14. p.10, para. 18, and Draft Code, Article 3.
15. Draft Code, Article 4(4); Report, para. 21.
16. Cmd. 9678.
17. Para. 815 and Appendix IV, Part I, para. 1(a).
18. Para. 825 and Appendix IV, Part I, para. 6.

(b) when the petitioner is in England at the commencement of proceedings if the parties last resided together in England;[19]

(c) when both parties are resident in England at the commencement of proceedings;[20] and

(d) when 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 domicil or residence.[21]

4. However, in circumstances (b) or (c) the court would not be empowered to pronounce a decree "unless (i) the personal law or laws of both the parties recognise as sufficient ground for a divorce or nullity of marriage a ground substantially similar to that on which a divorce is sought in England, or (ii) the personal law or laws of both the parties would in the circumstances of the case permit the petitioner to obtain a divorce on some other ground".[22]

5. Although efforts were made in 1957 to legislate on the lines of this Code, the view was eventually taken that the Code could not form a satisfactory basis for legislation.

The Two Domicil Bills

6. In May 1958 Lord Meston introduced into the House of Lords a Bill to implement most of the recommendations of the Wynn Parry Report.[23] The Second Reading Debate[24] and the Committee[25] and Report[26] Stages were almost wholly concerned

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19. Para. 831 and Appendix IV, Part I, para. 1(b).
20. Para. 831 and Appendix IV, Part I, para. 1(c).
21. Para. 842 and Appendix IV, para. 2.
22. Para. 831 and Appendix IV, para. 1. These proposals have been generally and severally criticised.
23. House of Lords, Official Report, Vol.209, col.371.
24. Ibid. cols. 808-822.
25. Ibid. Vol. 210, cols. 355-372.
26. Ibid. Vol. 211, cols. 15-24.

with the position of married women and with pleas for a wife to be able to acquire a separate domicil. There was no opposition to the Bill until the Third Reading when Lord Hawke raised the question of the effect of the Bill on the income tax and estate duty liability of foreign businessmen, who, although resident in England, had retained their foreign domicil.[27] The Bill was given a Third Reading and sent to the House of Commons. But it lapsed because of the end of the Parliamentary session.

7. In January 1959 Lord Meston introduced a second Bill which omitted various presumptions recommended in the Wynn Parry Report.[28] The Bill included, however, the provision that a wife was to be in no different position from any other person over the age of sixteen. It passed through the Lords but its sponsors dropped it before it reached the Commons. They could not find an acceptable formula reconciling the apprehensions of foreign businessmen with the recommendations of the Wynn Parry Committee.

The Private International Law Committee's Seventh Report[29]

8. In November 1959 the Committee, now under the chairmanship of Cross J. was invited:-

(a) to reconsider the recommendations for the reform of the law of domicil contained in the Committee's First Report in the light of the objections taken to the two Domicil Bills recently before Parliament; and

(b) to recommend what provisions are required to avoid any legal difficulties which may be expected from an alteration of the law placing a married woman in the same position as any other person of full age and capacity for the purposes of the law of domicil.

Its main conclusions were:-

(1) "Our law of domicile would be improved if the approach to the problem were changed in the way recommended in the Committee's First Report".

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27. House of Lords, Official Report, Vol. 211, cols. 206-209.
28. Ibid. Vol. 213, col. 709 and Vol. 214, cols. 237-257.
29. Cmnd. 1955.

(2) "Any such change which was not accompanied by a provision maintaining the status quo in the case of Commonwealth and foreign 'businessmen' resident here (at all events so far as their liability to tax and estate duty is concerned) would again be strongly opposed".

(3) "A formula excepting 'businessmen', whether from overseas or not, could be devised which would cover most cases, but its introduction would made the change itself hardly worth while and would probably not allay all hostility to it".

(4) "The alternative of separating 'fiscal domicile' from domicile for other purposes raises issues of great difficulty".

(5) "To confer on a married woman who is not separated from her husband by an order of a court of competent jurisdiction a right to acquire a separate domicile for all purposes would involve legal complications outweighing any advantages that might accrue".

9. No legislation to implement these recommendations has been introduced.