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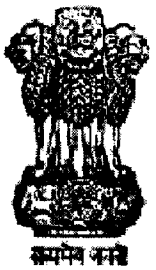

SIXTY- FIFTH REPORT

ON

RECOGNITION OF FOREIGN DIVORCES

April, 1976

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P. B. GAJENDRAGADKAR

D.O. No. F. 2(5)/75-L.C.

'A' WING, 7TH FLOOR,
SHASTRI BHAVAN,
NEW DELHI-110 001,
April 5, 1976.

MY DEAR MINISTER,

I have great pleasure in forwarding herewith the 65th Report of the Law Commission on "The Recognition of Foreign Divorces".

You may recall that, in your letter addressed to me on the 13th March, 1975, you had invited the attention of the Commission to certain observations made by the Supreme Court in *Smt. Satya* v. *Teja Singh* (A.I.R. 1975 S.C. 105), and had suggested that the Commission should examine the matter and "favour the Government" with its Report.

In accordance with its usual practice, the Commission first made a preliminary study of the subject and a draft report was prepared. This draft Report was subsequently revised after discussion in the Commission, and the revised draft Report was again discussed and has now been finalised.

This is the 65th Report since the inception of the Commission. After the reconstitution of the Commission in September 1971, it has forwarded to the Government twenty-one Reports (Nos. forty-five to sixty-five) including the present one ; after the present Commission was reconstituted in September, 1974, it has forwarded five reports including the present one.

It may not be inappropriate to point out that the nature of the subject matter of the present Report is substantially different from the subject-matter of the Reports so far forwarded by the Commission.

Conflict of laws often raises sensitive and delicate questions ; and the subject of recognition of foreign matrimonial adjudication happens to be particularly sensitive and delicate.

Our rules of private International Law have not been codified and in this branch, particularly in regard to domestic relations, there are few statutory provisions directly relevant. The law is essentially judge-made, and even so in India not many judicial decisions are available on the subject.

Having regard to the nature of the subject, on which not much assistance from judicial decisions is available, it became necessary for the Commission to study the comparative materials in depth in order that the various aspects of the problem could be properly judged and formulation of recommendations made in a satisfactory manner. Besides, in dealing with the problem, the Commission found that certain difficult questions of interpretation of the relevant statutes had to be faced and the Commission has attempted the task as best as it could.

In drafting its Report, the Commission has dealt with the historical development of the various rules of law and brought out their relevance on the points under examination. The recommendations which the Report ultimately makes along with the theoretical examination of the problem will speak for themselves.

I would like to mention that we have made a radical departure in suggesting that, in considering the questions about the recognition of foreign decrees of divorce, our courts should base their decisions not only on the question of domicile, but also on the basis of habitual residence and nationality. The Report also considers the problem about the ancilliary orders passed by the foreign courts in dealing with matrimonial proceedings and on this matter, the conclusion of the Commission is that these ancilliary orders should not be treated as binding by our courts even though the foreign decrees of divorce are recognised. These ancilliary orders concern the custody of children and other allied questions, and we thought it would be juristically imprudent to treat them as binding.

While forwarding this Report, I would like to suggest that it would be useful if, after the Report is printed, its copies are sent to the Law Faculties of different Universities in India, to the Bar Councils in different States, the Bar Council of India, as well as the Supreme Court and the High Courts. I am making this suggestion because the Report deals with a matter of importance which is not covered by any statute, and on which material had to be collected from different sources. I venture to hope that the academic institutions in this country would find the Report to be interesting, informative and instructive.

In fact, if you agree, my present suggestion would apply to all the Reports that the Commission makes, because if, after our Reports are printed, they are circulated to the relevant academic and professional institutions, it may encourage a debate on the questions considered by the Commission, and that may assist the Government in coming to its own conclusions on the relevant recommendations made by the Commission in its respective Reports.

With warm personal regards.

Yours sincerely,

Sd./-

(P. B. GAJENDRAGADKAR)

THE HON'BLE SHRI H. R. GOKHALE,
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REPORT ON RECOGNITION OF FOREIGN DIVORCES

CONTENTS

CHAPTER 1

INTRODUCTORY

I. SCOPE OF THE REPORT

Introductory.

1.1. This Report deals with the question of recognition by Indian courts of divorces and judicial separations obtained in foreign countries. The subject has been taken up by the Law Commission on a reference made by the Union Government.[1] The scope of the Report will be explained later.[2]

Procedure adopted.

1.2. On receipt of the reference made by the Government, a draft Report on the subject was prepared, and discussed at the meetings of the Commission. Since the Commission was given to understand[3] that Government would like its advice at an early date, it has not been possible to place the subject before the public—as is the usual procedure of the Commission—for inviting views or comments of interested persons and bodies.

Report not confined to persons of particular community.

1.3. At the outset, it should be made clear that this Report is not confined to divorces or judicial separations obtained by persons of a particular community. Although the judgment of the Supreme Court in *Satya's case*,[4] to which reference has been made in the letter received from the Government,[5] related to a marriage between Hindus, the question of recognition in its basic juristic nature requires that it should be considered in respect of persons of all communities. This position will be clear from the following observations made by the Supreme Court as to the nature and scope of the question:—

> 'The High Court framed the question for consideration thus: "Whether a Hindu Marriage solemnised within this country can be validly annulled by a decree of divorce granted by a foreign court." In one sense, this frame of the question narrows the controversy by restricting the inquiry to Hindu marriages. In another, it broadens the inquiry by opening up the larger question whether marriages solemnised in this country can at all be dissolved by foreign courts. In any case, the High Court did not answer the question and preferred to rest its decision on the *Le Mesurier* doctrine that domicile of the spouses affords the only true test of jurisdiction. In order to bring out the real point in controversy, we would prefer to frame the question for decision thus: *Is the decree of divorce passed by the* Nevada Court U.S.A. entitled to recognition in India ? The question is a vexed one to decide and it raises issues that transcend the immediate interest which the parties have in this litigation. Marriage and divorce are matters of social significance .....'

The present reference[6] by the Government indicates clearly that the Commission has been requested to consider the problem in all aspects, in the light of the suggestions made in *Satya's case*.

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[1]Letter of the Minister of Law, Justice and Company Affairs to the Chairman of the Law Commission, No. F. 7(6)/75, dated 13th March, 1975 (*See* Appendix).

[2]Paras. 1.3 and 1.4, *infra*.

[3]Request made orally by the Ministry of Law.

[4]*Satya* v. *Teja Singh*, A.I.R. 1975 S. C. 105, 107, para. 7 (para. 1.4, *infra*.).

[5]Paragraph 1.1, *supra*., and Appendix.

[6]*See* Appendix to this Report.

Supreme Court's judgment in *Satya* v. *Teja Singh.*

1.4. Before proceeding further, we would like to summarise the facts in *Satya's case,*[1] in order to indicate the nature of the question to be considered. In that case, the appellant,—a Hindu married woman—filed a petition for maintenance under section 488 of the Code of Criminal Procedure, 1898 (now section 125 in the Code of 1973), against her husband. The respondent, who was in America for 5 years, pleaded that his marriage with the appellant had been dissolved by a decree of divorce granted by the Court of the State of Nevada, U.S.A. in 1964, and the appellant had, therefore, ceased to be his wife.

The question to be considered was whether the divorce granted by the Nevada Court on the basis of *bona fide* residence should be recognised in India. The Punjab High Court held,—

(i) that the Nevada Court had jurisdiction to pass a decree of divorce on the basis of the domicile of the parties, and

(ii) that the domicile of the wife during marriage followed the domicile of the husband.

For this conclusion, the High Court primarily relied on the decisions of the Privy Council in—

(i) *Le Mesurier* v. *Le Mesurier*;[2]

(ii) *Attorney General of Alberta* v. *Cooke*;[3]

and of the House of Lords in—

(iii) *Lord Advocate* v. *Jaggery*.[4]

1.5. Against this decision of the Punjab High Court, the petitioner took an appeal to the Supreme Court. The question for consideration in the appeal before the Supreme Court was whether the decree of divorce passed by the Nevada Court (U.S.A.) was entitled to recognition in India, as had been held by the High Court.

1.5A. Reviewing the law on the subject, the Supreme Court noted[5] that, according to private international law, as interpreted in *Le Mesurier,*[6] the domicile for the time being of the married couple afforded the only true test of jurisdiction to dissolve their marriage.

This test, however, was subject to statutory modifications in England. These modifications were also discussed by the Supreme Court, but the discussion need not be reproduced here.

The Supreme Court then referred to the latest English Act, namely, "The Recognition of Divorces and Legal Separations Act 1971", which brought about certain radical changes in the law relating to the recognition of divorces, and in that connection, it summarised its important provisions.[7]

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[1] *Satya* v. *Teja Singh*, A.I.R. 1975 S. C. 105 (On appeal from A.I.R. 1971 Punj. 80).
[2] *Le Mesurier* v. *Le Mesurier*, (1895) A.C. 517 (P.C.).
[3] *A. G. of Alberta* v. *Cooke*, (1926) A.C. 444 (P.C.).
[4] *Lord Advocate* v. *Jaggery*, (1921) A.C. 146 (H.L.).
[5] Page 107, Para. 6, in A.I.R. 1975 S.C.
[6] *Le Mesurier* v. *Le Mesurier*, (1895) A.C. 517 (P.C.).
[7] Page 113, para. 32, in A.I.R. 1975 S. C.

The Supreme Court also took care to add that the test of domicile was not adopted in many countries, and observed that, "we cannot adopt mechanically the rules of private international law evolved by other countries".[1] American law on the subject of recognition was also discussed.

1.6. Coming to the facts of the case, the Supreme Court noted that the judgment of the High Court was based on the assumption that the parties were domiciled in Nevada.[2] But, on the facts, the parties' domicile was not in Nevada. The husband had misled the Nevada Court, which had exercised jurisdiction on the basis of his *bona fide* residence,[3] by stating that he wished to stay there. Actually, he left immediately. The Supreme Court pointed out that if the foreign decree was obtained by the fraud of the petitioner, it would not be recognised. The plea of fraud was not seriously argued before the High Court, but was very material on the facts.

In the present case, the record showed that the respondent left India for U.S.A. in January, 1959, and spent a year in the New York University and four years in the Utah State University, and later secured employment there. He filed a petition for divorce in the Nevada Court in November, 1964. He falsely represented to the Nevada Court that he was a *bona fide* resident of Nevada, and left Nevada immediately after obtaining the decree. Thus, the Nevada Court lacked jurisdiction. The Supreme Court observed[4] that residence for a particular purpose being accomplished, the residence would cease ; and the residence must answer a "qualitative as well as a quantitative test", i.e. the two elements of factum and animus must concur. On these facts, the *Le Mesurier* doctrine lost its relevance to the case.[5]

1.7. The Supreme Court also referred to section 13 of the Code of Civil Procedure, 1908, under which a foreign judgment is conclusive, subject to the exceptions mentioned in various clauses of the section. The Supreme Court, however, pointed out[6] that under clause (a) of that section, a foreign judgment is not conclusive where it *has not been pronounced by a competent court.* In this case, the Nevada Court was not competent to dissolve the marriage, for the reasons mentioned above.

Again, section 13(e) of the Code provides that a foreign judgment is not conclusive "where it has been obtained by fraud." That clause was also applicable to the facts of this case.

For these reasons, the divorce granted by the Nevada Court could not be recognised. The foundation on which the High Court had recognised the decree, did not exist. Accordingly, the Supreme Court allowed the appeal.

1.8. The Supreme Court noted that the result of the decision would be that the parties would be treated as divorced in Nevada, but their bond of matrimony would remain unsnapped in India,—the country of their domicile.[7]

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[1]Page 109, para 9, in A.I.R. 1975 S.C.

[2]Page 116, para 45, in A.I.R. 1975 S.C.

[3]Page 109, para. 15, in A.I.R. 1975 S.C.

[4]Page 116, para 45, in A.I.R. 1975 S.C.

[5]Page 116, para 46, in A.I.R. 1975 S.C.

[6]Page 117, para 49, in A.I.R. 1975 S.C.

[7]Pages 117-118, para 52, in A.I.R. 1975 S.C.

The Supreme Court further observed[1] that our legislature ought to find a solution to such "schizoid situations", as the British Parliament had, to a large extent, done by passing the Act of 1971. Perhaps, the Hague Convention of 1970, which contained a comprehensive scheme for relieving the confusion caused by different systems of conflict of laws, may serve as a model. But, the Supreme Court added, any such law shall also have to provide for the non-recognition of foreign decrees procured by fraud bearing on jurisdictional facts, as also for the non-recognition of decrees, the recognition of which would be contrary to our public policy. Until then, the courts shall have to exercise a residual discretion to avoid flagrant injustice,[2] for no rule of private international law could compel a wife to submit to a decree procured by the husband by trickery. "Such decrees offend against our notions of substantial justice."[3]

It is in the light of these observations that the general problem of recognition will be discussed in this Report.

Need for legislation.

1.9. We shall later deal with the existing law as to recognition and connected matters, and the position in England. Before proceeding further, we would like to stress the relevance and importance of this inquiry. The increasing migration to and from India, of Indians as well as other persons underlines the need for legislation. India is not a party to the Hague Convention,[4] but that fact is immaterial in a consideration of the broad question whether legislation is needed on the subject.

Code of Convention.

1.10. We may incidentally mention here that the possibility of limping marriages would be reduced, if all countries became party to the Hague Convention and adopted, as a basis for the recognition of foreign divorces, such of the criteria provided for in the Convention as are acceptable to each country having regard to its conditions.

II. LEGISLATIVE DEVICE TO BE ADOPTED

Most convenient mode of dealing with subject—separate legislation.

1.11. In view of the wide scope of this Report as explained above,[5] another question may also be dealt with, before we proceed to deal with the subject-matter of this Report. The question is this—What specific legislative device should be adopted to give legal effect to our recommendations? This question arises because of the peculiar position that prevails in India on the subject of matrimonial and connected legislation. First, there is no enactment in India dealing directly with the recognition of foreign decrees of *divorce and judicial Separation*,—except the provisions[6] in section 13 of the Code of Civil Procedure, 1908, and section 41 of the Indian Evidence Act, 1872, which are general in character and do not deal specifically with the problem of recognition of divorces.

Secondly, we may also point out that the law relating to marriage and divorce in India is not contained in one enactment. In so far as the law is codified, it is contained in several enactments[7] applicable to members of several communities respectively. These enactments do not contain specific provisions as to the recognition of foreign judgments of divorce or legal separation, and that is logical, because the question of recognition of *foreign judgments* is outside their legitimate scope. In this position, our recommendations could not be carried out by merely amending one Act, as such a course would leave out communities governed by other Acts.

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[1]Page 118, para 53, in A.I.R. 1975 S.C.
[2]Page 118, para 53, in A.I.R. 1975 S.C.
[3]Page 118, para 53, in A.I.R. 1975 S.C.
[4]Information obtained from the External Affairs Ministry.
[5]Para 1.3, *supra*.
[6]Chapter 4, *infra*.
[7]Chapters 5-6, *infra*.

One possible mode of implementing our recommendations would be to amend each of those enactments. Obviously, this is not a very convenient course. Also, it is open to certain theoretical and practical objections. Moreover, it would leave out communities whose personal law is not codified. We shall deal with those objections in detail later.

The second alternative mode of implementing our recommendations would be to amend the provisions in the Code of Civil Procedure and in the Indian Evidence Act, to which we have already adverted,[2]—which are general provisions as to foreign judgments and certain judgments concerning status. That also is not a very appropriate course, because those provisions are not confined to decrees of divorce or legal separation. Besides, they are procedural. Moreover, as will be evident from the various points which will be made in this Report[3] hereinafter, an elaborate set of provisions will be required to give effect to our recommendations, and, as a matter of drafting convenience, it will not be feasible, in our opinion, to incorporate them by a mere amendment of the provision in the Code of Civil Procedure, or in the Indian Evidence Act. In our opinion, therefore, the appropriate course will be separate and self-contained legislation, which would deal with recognition, in India, of foreign divorces and legal separations.

Theoretical and practical objections to amending existing enactments.

1.12. We have referred above[4] to certain theoretical and practical objections which could be raised to the device of merely amending the various enactments dealing with the marriages of persons belonging to various communities. We may now elaborate those objections. What requires to be pointed out in this context, is that while most, if not all, of these enactments deal with persons belonging to a particular religion—excepting the Special Marriage Act, 1954, whereunder the religion of the parties marrying is immaterial,—the decrees of divorce or judicial separation to which our recommendations relate would be decrees passed in foreign countries, and would not be confined to persons professing those religions. The decrees could even relate to persons professing no religion. Secondly, those decrees would, even in the case of persons married under Indian legislation, have been passed, not necessarily on the grounds referred to in the relevant Indian legislation, but on grounds which are regarded as admissible under the law applied by the foreign Courts, whose decrees later come up for recognition.

We need not, in the present chapter, deal with the vexed question as to the law which should be applied by the courts of a particular country when passing decrees of divorce. But we may state that the foreign Court which exercises jurisdiction would, at least in the Commonwealth, ordinarily apply not the Indian enactment, but its own law as to the grounds of divorce.[5]

1.13. Even where the parties were domiciled in India when they were married, it is not inconceivable that a foreign Court may dissolve a marriage between Hindus or Muslims who were married in India, and who are, at the time of the proceedings in the foreign court residing in the foreign country. In doing so, the foreign Court, if it is otherwise competent, may, without committing any breach of the relevant rules of its own private international law, dissolve the marriage on grounds or in circumstances *valid* under the Hindu Marriage Act or

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[1] *See* para. 1.12, *infra.*

[2] *See supra.*

[3] *See* particularly, Chapters 10-11, *infra.*

[4] Para 1.11, *supra.*

[5] *See* Chapter 3, *infra.*

under Muslim Law as administered in India, or its statutory modifications. In this position, addition of the proposed provisions for recognition to the Hindu Marriage Act or other comparable law, would not be a very appropriate method of dealing with the subject.[1]

Apart from this, there is the practical aspect, namely, the cumbersome procedure that will obviously be necessary if Parliament is to amend *numerous enactments* now in force, dealing with the marriages of members of various communities.

The parties who have obtained the divorce in the foreign country, might be domiciled in India or not so domiciled. Their marriage might have taken place in India, or it might have taken place outside India but under an Indian enactment, or it might have been celebrated outside India but not under an Indian enactment. Obviously, the problems arising out of all these various permutations and combinations can be better dealt with by separate enactment.[2]

III. GENERAL APPROACH

Fundamental question as to general approach.

1.14. Having dealt with the proper legislative device to be adopted to implement our recommendations, we proceed to advert to one fundamental question which is to be considered, namely, what ought to be the general approach in such matters ? It is easy to say that a limping marriage must be avoided. But we venture to suggest that this proposition cannot be raised to the status of a dogma. There must be cases where one of the parties to the marriage may, for legitimate reasons, like the marriage to survive and the foreign divorce to be disregarded. A familiar example is the case where the divorce was granted by the foreign court without giving a hearing to the opposite party.[3] It is obvious that in such cases the consideration that a limping marriage should be avoided, is over-ridden by other considerations of justice.

There could be other comparable situations also. To formulate the criteria for the recognition of a foreign divorce in wide and unqualified terms would, no doubt, tend to decrease the number of limping marriages, but it would not always lead to justice. There are a number of cases where justice to the opposite party (the party who was the respondent in the divorce proceedings in the foreign court), requires that the matter adjudicated upon by the foreign court should be considered again. The fundamental aspect to be considered, therefore, is this—the rules to be laid down on the subject should be such as to do substantial justice to both the parties and, subject to that consideration, as to avoid limping marriages as far as practicable.

Wide range of choice.

1.15. The range of choice is a wide one. Between the extremes of *no* recognition of divorce on the one hand, and the recognition of *every* divorce on the other, there is obviously a wide scope for possible variations. At a time when, as a matter of internal law, divorce was severely restricted, it was natural that a similarly guarded view should be taken with respect to jurisdiction for divorce and the recognition of foreign divorces. This was reflected in the famous language of Lord Penzeance in *Wilson* v. *Wilson*.[4]

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[1] *See* Chapter 3, *infra*.

[2] Para. 1.11, *supra*.

[3] Compare article 8 of the Hague Convention.

[4] *Wilson* v. *Wilson*, (1872) L.R. 2, P. & D. 435, 442.

"It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and a woman are held to be man and wife in one country, and strangers in another."

Views of Wolff.

1.16. As Wolff observes,[1] it is impossible to recognise all judgments of all courts in any country all over the world, despite its manifest advantages, as the disadvantages are equally manifest in so unrestricted a recognition:

"It is not advisable to trust every court in the world to administer justice irreproachably. Bribery of Judges may have become so rare as to reduce this risk to a minimum ; but in some countries unsatisfactory legal education, appointment of Judges from political motives, and the influence which the state or some powerful criminal organisation within the State brings to bear on the Judges are considerable obstacles to a universal recognition of judgments. Further, even where there is no danger of any kind of corruption of courts, differences between two countries in their fundamental attitude to questions of morality or public policy, must often make the recognition of some individual judgments seem undesirable. Finally, general recognition might result in grave injustice where the same relationship was regarded differently by the courts of two countries as in cases of marriage, divorce, inheritance, etc."

Cardozo's view.

1.17. Cardozo, in his Paradoxes of Legal Science, dealt with the problems of rest and motion, stability and change, particularly as they are reflected in the law.[2] His words have often been quoted—"The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law."

Justice—the ultimate consideration.

1.18. Ultimately, the rules relating to conflict of laws have to be examined from the point of view of justice and the broader consideration of social policy which conflicting laws may evoke.[3]

IV. NATURE OF RULES AS TO CONFLICT OF LAWS

Nature of rules.

1.19. At this stage, we would like to make certain observations as to the nature of rules as to conflict of laws. These rules are often mistaken to be rules of international law, but, in reality, they do not belong to the domain of the "law of nations",—they do not purport to regulate the conduct of nations *inter se*. Their subject-matter is "international" only in the sense that they involve relations, acts or events or other questions having a *foreign* element, or—to put it in different words—involving questions transcending the boundaries of one nation. But they are not administered by international tribunals. They do not draw their content from the traditional sources of international law.

Rules as to conflict of laws—Nature of.

1.20. Essentially, conflict rules originate in each individual legal system. The expression "conflict" is, of course, merely a convenient simile, indicating two aspects, namely,—(i) that the fact or legal relation in question is possibly governed by *several legal systems or jurisdictions*, and (ii) rules are needed to decide which of these several legal systems or jurisdictions should be applied to the

[1]Wolff, Private International Law (1945), cited in *Abdul Wazid* v. *Wishwanathan*, A.I.R. 1953, Mad. 262-264.

[2]Cardozo, The Paradoxes of Legal Science (1928), page 4.

[3]Cavers, in (1933) 47 Harvard Law Review 173.

actual case. Because several legal systems co-exist, it becomes necessary to determine their applicability.[1] The decision as to which rule should apply has ultimately to be just and fair, as far as possible, to all concerned.

Courts enforcing homologous rights.

1.21. One of the great American judges, Learned Hand, has repeatedly stated, in differing phrases,[2] that courts enforce only rights of their own, and never 'foreign' rights.[3]

> Thus, in *Guinness* v. *Miller, Judge Learned Hand said*[4]:—
>
> "When a court takes cognizance of a tort committed elsewhere, it is indeed sometimes said that it enforces the obligation arising under the law where the tort arises ..... However, no court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognised by the sovereign. A foreign sovereign under civilized law imposed an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs."
>
> Lord Parker spoke to much the same effect in an English case[5]:
>
> "Every legal decision of our courts consists of the application of our own law to the facts of the case as ascertained by appropriate evidence. One of these facts may be the state of some foreign law, but it is not the foreign law but our own law to which effect is given, whether it be by way of judgment for damages, injunction, order declaring rights and liabilities, or otherwise."

V. PROBLEM OF RECOGNITION OF FOREIGN JUDGMENTS

Problem of recognition—essential nature.

1.22. In order that the problem of recognition may suitably dealt with in the light of the general observations made above, it is desirable to put the problem in a proper perspective. The problem of recognition is, in its essence, one of attributing validity to a foreign judicial act. We shall have occasion to deal also with extra-judicial divorces obtained in foreign countries but, principally, the matter will be discussed with reference to judicial determinations of foreign courts.

The problem is not totally new, and the issues that arise for our discussion are also not unknown. But it may be stated that because of the increase in mobility of individuals, and because of the variety of legal systems which an individual may encounter by reason of his crossing the boundaries of his state, the frequency of the issues arising has increased in modern times.

History of recognition of judgments—civil law.

1.23. Even in the civil law system[6] with its many independent territorial units, the problem of recognition of foreign judgments has been of comparatively recent origin.

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[1] *See* "Current Developments in Private International Law" (1964) Vol. 13, American Journal of Comparative Law, page 542.

[2](a) *Guinness* v. *Miller*, (1923) 291 F. 769, 770;
(b) *The Jame's McGee*, (1924) 300 F. 93, 96;
(c) *Direction der Disconto-Gesellschaft* v. *U. S. Steel Corp.*, (1924) 300 F. 741, 744.
(d) *Scheer* v. *Rockne Motors Corp.*, (1934) 68 F. (2D) 942, 944.
(e) *Siegman* v. *Meyer*, (1938) 100 F. (2D) 367.

[3] *See* Earnest Lorenzen, Book Review in (1948) 64 L.Q.R. 129, 130.

[4] *Guinness* v. *Miller*, (1923) 291 Fed. 768, 770 quoted by Oheshire (1975), page 28. and *see* Cavers (1950), 63 Harv. L.R. 822.

[5] *Dynamit Action-Gesellschaft* v. *Rio Tinto Co.*, (1918) A.C. 292, 302.

[6] Bhrenswieg Conflict of Laws (1962), page 16.

(a) The classical Roman practice of freely executing Roman judgments anywhere *within the provinces of the realm*,[1] *in apparently carried* over into the ideological entity of the Christian Empire of the Middle Ages. "*The fact that there existed in the Middle Ages among* the Christian Peoples a Jus commune resting upon Roman Law, made the enforcement of judgments appear as a very natural precept of justice and of mutual assistance.[2]" This practice is fortified by the natural and international law concepts of the 16th and 17th centuries.[3]

(b) Even when the rise of the dogma of sovereignty[4] came to arouse misgivings concerning the recognition of foreign judgments, respect for the susceptibilities of the foreign sovereign continued to preclude re-examination of his decrees based on his accepted "jurisdiction".

"To undertake to examine the justice of a definitive sentence, is to attack the *jurisdiction* of him who has past it". This is what Vattel Wrote.[5-6]

Only with the later growth of nationalism was this attitude of international *courtesy* (often rationalised by references to tacit agreement or concert), turned into a "bars comity", which left to each state complete freedom in scrutinising the findings of foreign courts.

1.24. The last mentioned attitude (theory of comity—i.e. discretion) is reflected in present-day European law and its derivatives, where nearly all divergent opinions and attitudes have survived, ranging from a flat denial or recognition by insistence upon a trial *de novo*: through a law granting recognition on condition of reciprocity: to a nearly unconditional enforcement of foreign judgments.[7]

Effect of the approach in the nature of "comity".

French attitude to foreign judgements[8] has been traced back to Article 121 of the so-called Code Michant, an Ordinance of 1629, which provided *that any foreign judgement recovered against French* citizens may be litigated anew.[9]

1.25. The problems of conflict of jurisdiction, particularly in relation to matrimonial matters, is essentially a human one. Whatever the law, whatever the theology, whatever the social order, the same kind of problem arises between human beings of opposite sexes at all times and in all countries. "*Human* beings make the problems law-makers adumbrate the rules applicable to the problems: lawyers are merely the technicians trying, not always successfully, to apply the rules to the solution of their clients' immediate difficulties, so it was and so it will ever be."[10]

Problem a human one.

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[1]Digest, De re judicata, 42, 1, 15, 1 (Ulpianus).

[2]Mofii Das Internationale Zivilprozessecht auf Grund der. Theurie, Casetagobung and Praxix (1906) 13, cited by Bhrenswieg, Conflict of Laws (1962), page 16.

[3]*See* Nussbaum, A Concise History of the Law of Nations (1947), page 69.

[4]Nussbaum, A Concise History of the Law of Nations (1947), page 56.

[5]Vattel Law of Nations or Principles of the Law of Nature. Applied to the Conduct and Affairs of Nations and Sovereigns (tranal, 1760) Vol. 1, 148 (Book II, Ch. VII, Section 84) cited by Bhrenswieg (1962), page 16.

[6]Vattel, cited by Bhrenswieg, Conflict of Laws (1962), page 16.

[7](a) Lorenson, "The Enforcement of American Judgments Abroad", (1919) 20 Yale L. J. 188;

(b) Kennedy, "Recognition of Judgments in Personne ; The Meaning of Reciprocity", (1957) 35 Can. B. Rev. 123.

[8]*Cf. Hilton* v. *Guyot*, (1895) 159 U. S. 173.

[9]Bee :

(a) Johnson, "Foreign Judgments in Quebec", (1957) 35 Can. Bar Rev. 911;

(b) Bhrenswieg, "Conflict of Laws" (1962), page 17.

[10]*Cf.* Joseph Jackson, Review of William Hay's Lectures on Marriage, (1969) 85 L. Q. R. at p. 291.

Problem of Conflict inherent in co-existence of various legal orders.

1.26. The problem of conflict is inherent in the co-existence of more than one legal order. So long as the courts of two or more States may claim jurisdiction over the same case and the laws are different, the problem of conflict is bound to arise.

In dealing with this problem, the court of the country concerned has to determine which law is to be applied, i.e., its own law or the law of any other country. Where the matter is *res intera*, the inquiry is as to which *system of law* should be applied. Where, however, there is already a judgment of a foreign court, this inquiry must be supplemented by an inquiry as to whether the foreign *judgment* should be recognised; and, if so, to what extent and in what respects and subject to what conditions—substantive or procedural.

1.27. In a Calcutta case[1], Rankin C.J. made the following observations which lucidly bring out this aspect :

> "It is manifest that, so long as the matrimonial law of different countries vary widely, as they do, it is necessary that for every marriage there should be ascertainable forum for the purpose of adjudicating upon the question of divorce. All countries do not take the same view of international law. But the view of international law which obtains in England in these Courts is that the power to grant divorce rests with the Court of the country in which the parties are domiciled at the date of the petition. Other countries may take different views of international law in that respect. But it is well settled now that that is the view upon which the English law proceeds and that view, for all purposes of this Court, is the law without exception or qualification by the command of the legislator."

Complexity of the problem.

1.28. Besides being inherent in the co-existence of legal orders, the problem of conflict is a complex one, as is illustrated by *Breen's case*. The question before Karminski, J., in *Breen* v. *Breen*[2] was whether an Irish court would recognise an English decree of divorce.[3] Under article 41, section 3(3), of the 1937 Constitution of Ireland: "No person whose marriage has been dissolved under the civil law of any other state but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within the jurisdiction during the life-time of the other party to the marriage so dissolved." This provision was invoked by the wife petitioner, who sought annulment of her marriage with the respondent at a registrar's office in Dublin in 1953, on the ground that her husband's former wife, when he married in 1944, was still alive. The husband stated that his previous marriage had been dissolved by the High Court, he being domiciled in England at all material times. The wife's reply to that was that English decree was not recognised by the law in Eire, and consequently the marriage in 1953 was bigamous.

Karminski, J., observed, in the course of his judgment, that there was no question here of any difficulty in the form of the marriage ceremony under Irish law, and it had not been suggested that either the wife or the registrar who

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[1] *Linton* v. *Guderian*, A. I. R. 1929 Cal. 599, 601.

[2] *Breen* v. *Breen*, (1964) Probate 144.

[3] See note, "Conflict of Laws—Recognition of English Divorce", in (1961) 232 Law Times 15, 16.

performed the ceremony was deceived in any way as to the status of the husband. The wife was well aware of the husband's earlier marriage and of its dissolution in England, and the husband was described in the marriage certificate as "divorced". His Lordship recalled that a difference of opinion on the point in question had been expressed by Maguire, C.J., and Moore J., in the Irish Supreme Court in *Mayo-Perrott* v. *Mayo-Perrott*.[1] The former was of opinion that sub-section (3) said as plainly as it could be said that a marriage dissolved under the law of another state remained in the eyes of the law of Eire a subsisting valid marriage. The latter, while recognising that the Oireachtas could pass a law that no dissolution of marriage, wherever effected even where the parties were domiciled in the country of the court pronouncing the decree, was to be effective to dissolve the pre-existing marriage, was of opinion that it had not done so, and the law existing when the constitution was passed was that a divorce effected by a foreign court, of persons domiciled within its jurisdiction, was valid in Eire. Karminski, J., thought it was highly unlikely that the constitution intended, without clear words, to reverse a practically universal rule of private international law. He could find nothing in article 41 to suggest that the courts, in the absence of further legislation, were entitled to do, otherwise than regard as valid and effectual a divorce granted by the courts of a foreign country where the parties were domiciled. Accordingly, he found that the law of Eire recognised the validity of the decree of dissolution pronounced by the English court dissolving the marriage between the husband and his first wife, and also recognised the validity of the marriage celebrated in Eire between him and the petitioner. The wife's petition was dismissed accordingly.

1.29. To cite one more example of the complexity of the matter in *Mayfield*, v. *Mayfield*,[2] the husband, a domiciled Englishman, had brought proceedings for divorce in Germany where his wife, a German national, was resident. After the German court had granted him a divorce, he brought a petition in the English courts for a *declaration that the German decree was valid* and should be recognised in English law. We are not concerned with the actual decision in the case, but the case is mentioned here to illustrate how occasion may arise for obtaining a declaration.

VI. SOME ASPECTS OF RECOGNITION

Recognition and enforcement.

1.30. For understanding the effect of recognition, it is desirable to refer to a few theoretical aspects thereof. A foreign judgment may be recognised by being enforced (immediately or upon suit), or by being treated as "res judicata".[3]

Recognition of a judgment, by treating it as *res judicata*, may consist of: (a) refusal to re-try the original cause of action at the instance of the plaintiff, by virtue of *its merger* in the foreign judgment *for the plaintiff*: (he can pray only for execution); (b) refusal to re-try the original cause of action at the instance of the plaintiff, by virtue *of a bar* established by the foreign judgment; (c) refusal by virtue of a collateral estoppel,[4] to re-try *questions of fact or* law litigated in the suit which has resulted in the foreign judgment; and (d) acceptance of a status declared by the foreign judgment.

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[1] *Mayo-Perrott* v. *Mayo-Perrott* (1958) I. R., 336.

[2] *Mayfield* v. *Mayfield* (1969) 2 W. L. N. 1002.

[3] *See* Scott, "Collateral Estoppel by Judgment", (1942) 56 Harv. L. Rev. 1.

[4] Note, (1948) 57 Yale L. J. 339.

Refusal under (a) and (b) above is based on that aspect of *res judicata* which is often described as "merger". Refusal under (c) relates not to the *entire* cause of action, but to the re-litigation of *particular questions*. While categories (a), (b) and (c) are operative only between the parties and their privies, category (d) applies in relation to strangers as well.

VII. NATURE OF PROCEEDINGS AND THEORIES OF RECOGNITION

Nature of proceedings.

1.31. We may mention here that the nature of proceedings in which the question of recognition may come up for consideration is not subject to any particular restriction. The question may come up directly between the parties. Or, it may arise between third parties. Then, the prayer may be for a declaration that the divorce is valid. Or, the prayer may be that the divorce may be declared to be void. The proceedings themselves could be of several types. One of the parties may re-marry, on the strength of the divorce granted in the foreign country, and, then, the opposite party may initiate proceedings for declaring the second marriage void, or may take appropriate steps for prosecuting the re-marrying party for the offence of bigamy. Or, the question of validity of a divorce may arise incidentally,—for example, where the parties to the marriage, alleged to be divorced by a foreign divorce, are arrayed on opposite sides, in a suit or petition for the grant of maintenance, the contention being that the previous marriage subsists, and has not been validly dissolved by the foreign court, so that the obligation to maintain the petitioning spouse, created by the marriage, subsists.

Theory of recognition.

1.32. There are several theories of recognition of foreign judgements.

When Story wrote his text on Conflict of Laws in 1834, he found Vattol's respect for the foreign sovereign's "definitive sentence"[1] more uniformly adhered to by common law courts than in the jurisprudence of Continental Europe. Nevertheless, he preferred to follow the approach of Chief Justice Marshall[2] who, presumably following civil law reasoning, subjected the foreign judgment to an examination of the rendering court's "lawful" jurisdiction over the cause and the parties.[3] The scope of further permissible scrutiny would, according to him, vary according to whether the judgment was one *in rem* or *in personam*. The former, he thought, "ought to have universal conclusiveness."[4] Judgments *in personam*, on the other hand, under a distinction founded in "international justice"[5], (though being an absolute bar as *res judicata* to any new suit by a losing plaintiff), were subject to examination "into the merits" if sued upon by a prevailing plaintiff.[6] For, the forum, in executing a foreign judgment, acts "upon the principles of comity; and has, therefore, a right to prescribe the terms and limits of that comity."[7] However, the question how far a foreign judgment could be "impeached" while being regarded an prima facie evidence of the claims,[8] remained unsettled.

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[1]Story, Conflict of Laws, 1934.

[2]*Rose* v. *Himaly*, (1808) 4 Cranch (8 U. S.) 240, 269.

[3]Story, 492.

[4]Story at 597. See *Williams* v. *Armpyd*, (1813) 7, Cranch (11 U. S.) 423; *Rapolio* v. *Diary*, 2 Dall. (2 U. S. 231) (1795). For a later case, see *Canis* v. *Beith*, 14 How. (55 U. S.) 399 (1852).

[5]Story, 497.

[6]Story, 497. See also *Smith* v. *Lewis* 3 Johnn, 157, 168 (N. Y. 1808), per Kent., Ch. J., relying on the opinions of "most approved jurists on the law of nations".

[7]Story, 497.

[8]Story, 508.

Lord Bottingham once held[1] "that it *was against the law of nations* not *to give credit to the* judgment and sentences of foreign countries. For, what right had one kingdom to reverse the judgment of another? What confusion would follow *in Christiandom if they should serve us* so abroad, and give no credit to our sentences."

Apart from these theories of comity and international law, many other theories have been put forth—the theory of vested rights (a foreign judgment creates a legal obligation between the parties), the theory of harmony, and so on.

VIII.—HISTORY

History of recognition in England.

1.33. The *theoretical* bases for recognition have, thus, remained controversial. Let us now look at a few historical aspects. Though certain particular judicial proceedings may have been recognised earlier,[3] it appears that English courts began *enforcing* foreign judgmnets somewhere in the 17th century.[3][4] In the seventeenth century, English courts decided that it was "against the law of nations not to give credit to the judgments and sentences of foreign countries."[5]

As to what was the law of nations, Jonkins, a judge of the Prize Court in the mid-1600s, though it was not the Civil Imperial Law, but "the generally received customs among the European governments which are most renowned for their justice, valour and civility."[6] However, a requisite which was laid down was that the foreign court must have possessed "proper jurisdiction".[6] It has been suggested that there were orginally no specific jurisdictional requirements. The foreign court was merely required to have observed the elementary precepts of natural justice. However, with the acceptance of the obligation or "vested rights" theory[7] in the nineteenth century, the jurisdiction requirements crystallised.

1.34. There cannot be any doubt that as early as 1845, a foreign judgment in favour of the defendant, if final and conclusive, was a good defence to an action in England for the same matter.[8]

Later developments were—(i) statutory, particularly in regard to monetary judgments, and (ii) judicial, particularly in regard to divorce.

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[1]In a note from his manuscript quoted in *Kennedy* v. *Earl of Cassailes*, 2 Swans. 313, as quoted by Wiscount Baldane in *Balveso's case* (1927) A. C. 641, 659.

[2]Sack, "Conflict of laws in the History of English Law", in the book Law; Century of progress 1835-1935, Vol. 3, pages 342-382.

[3]Newland v. *Horsran*, (1681), 23 English Reports 275 (Annotation and see Hosworth. History of English Law, Vol. II, pages 269, 270.

[4]Contington's Case in *Kennedy* v. *Caseillis*, (1878) 2 Swans. 313, 326; 36 E. R. 635, 640; see also *Reach* v. *Garyan*, (1748); 1 Ves Sec. 157, 159; 27 S. R. 954, 955. This view also found favour in the United States; see *Rose* v. *Himely*, 8 U. S. (4 Cranch) 240; 2 L. Ed. 608 (1808).

[5]Holdsworth H. E. L. Vol. 3, p. 654.

[6](a) *Ex* v. *Yewis*. (1749) 1 Ven. 298; 27 S. R. 1043;
(b) *Ex p. Oillian*, (1795) 2 Ven. Jun. 587; 30 E. R. 790.
(c)*Buchanan* v. *Rucker*, (1908) 9 East 192; 103 M. R. 546.

[7]Para. 1.163, *supra*.

[8]*Hicarde* v. *Garcias*, (1845) 12 Cl. & F. 368, 406

IX. CONNECTED MATTERS

Recognition of foreign decree and jurisdiction of foreign courts.

1.35. It may, in this context, be of importance to point out that the problem of recognition of foreign judgments is, to some extent, connected with the problem of the jurisdiction of foreign courts. In order that the forum in India may recognise the foreign judgment, it is relevant to consider the question whether the foreign judgment was pronounced by a court having jurisdiction in the international sense,—to borrow the words of Wright, J.,[1]—"in such a sense that in conformity with general jurisprudence and ordinary international law and usage the courts of other States will regard its judgments as binding."

Aspect of reciprocity.

1.35A. There is another aspect of the matter. If our courts insist that the foreign judgment should be in conformity with general jurisprudence and ordinary international law and usage in order that we may regard the foreign judgment as leading: our own courts should, broadly speaking, also exercise jurisdiction on a ground in conformity with general jurisprudence and ordinary international law.

We shall revert to this aspect later.[2]

Relevance of discussion of principles on which Indian courts exercise jurisdiction.

1.36. These comments are made at this stage, in order to show how it is not irrelevant to discuss the principles on which, under Indian legislation, Indian courts are regarded as competent to exercise jurisdiction in respect of the grant of divorce or judicial separation. Though the rules belonging to the domain of conflict of laws originate in municipal law, their function is international.

Expression "legal separation" why used.

1.37. We may, before closing this Chapter, make it clear that though the expression used in Indian legislation dealing with matrimonial relief is "judicial separation", we are using the expression "legal separation" in this Report, first, because that expression is frequently used outside India, and secondly, because "legal separation" is a term which will cover separation by mutual agreement also.

CHAPTER 2

HEADS OF RECOGNITION

DOMICILE—NATIONALITY—RESIDENCE

I. INTRODUCTORY

Introductory.

2.1. It will be convenient, at this stage, to make certain general observation as to the possible heads of recognition of divorce and legal separation.

Connecting factors.

2.2 Recognition of a judgment essentially means recognition of a *connecting factor*. The possible connecting factors may be classified, in conflict of laws, with reference to a variety of considerations, such as[3]—

(a) domicile;

(b) residence, which again may mean—

(i) permanent residence, (ii) habitual residence, (iii) ordinary residence, or (iv) residence *simplicitor* at a given moment;

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[1] *Turnball* v. *Walker*, (1912), 69 Times Law Reports, 767 (Wright, J.).

[2] See Chapter 12, *infra* (Reciprocity).

[3] The list is illustrative only.

(c) the situation of the legal relation:

(d) origin of the legal conduct:

(c) nationality.

We shall discuss a few of them which are of practical importance in the present context.

Personal law.

2.3. According to generally accepted principles of private international law, the courts of most states will decide issues of personal status and allied matters (marriage, divorce, devolution of property upon death, etc.), by applying the "personal" law of parites.[1] In states with a legal system based upon the common law, this "personal" law will be the law of the domicile (the place where the individual concerned has, or had at the appropriate time, his permanent home);[2] but, in civil law systems, the personal law is often that of the state of nationality.[3]

Two aspects of sovereignty.

2.4. The sovereign power of a State finds expression in two respects:

(a) in its *personal power*, by which it controls the name of its nationals; and

(b) in its territorial sovereignty, by exercising power on its territory.

The theory of domicile,[4] as a test of jurisdiction in matrimonial cases, attaches greater importance to the second aspect, while the theory of nationality[5] attaches greater importance to the first aspect.

However, it may be noted that the possible effect of applying the test of nationality, is, in continental countries, such sub-dued, by reason of the application of various special doctrines, chief amongst which is the doctrine of public policy (*order public*). We shall, in due course, examine the doctrine of public policy,[6] and its relevance to the recognition of decrees of divorce.

II. DOMICILE—THE GENERAL CONCEPT

Domicile.

2.5 Coming to the specific heads of recognition, we may begin with domicile. According to traditional English law, recognition of a divorce granted by a foreign court was limited to cases where both the parties were domiciled in the foreign country. Certain modifications or qualifications of this rigid doctrine found their place later. But, we shall discuss these at the proper place[7].

Derivation of the word.

2.5A. The word in Latin is *domicillium*, which is derived from the word *domus*—meaning home. The exact legal definition of this word has caused jurists a considerable difficulty, and there is no one definition which has been unanimously accepted.

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[1]Enrenswsigh, Conflict of Laws (1962), p. 372.

[2]Goodrich, Conflict of Laws 4th ed., pages 32-38.

[3]Grieg, International Law (1973), page 303.

[4]Para. 2:3, *supra*.

[5]Para. 2:3, *supra*.

[6]See Chapter 17, *infra*

[7]See Chapter 7, *infra*.

Broadly speaking, domicile connotes the place where a person intends to make his permanent home. Domicile is "an idea of law", as Lord Westbury said[1]. It connotes different ideas in different legal systems. Domicile cannot be a precise concept. Excessive emphasis on animus (intention) as a constituent of "domicile", has led to certain problems, as will be seen later.

In India, there are detailed provisions on the subject of domicile in the Indian Succession Act,[2] but their scope and applicability is limited.[3] The concept of domicile is mentioned in article 5 of the Constitution of India, but not defined.

Rules as to domicile.

2.6. Every individual has a domicile of origin, which can be lost by the acquisition of a domicile of choice. A domicile of choice is more easy to shed than the domicile of origin. In general, according to English law, the domicile of origin is revived when a domicile of choice is terminated and another domicile of choice is not yet acquired. Again, according to the traditional rules of English common law, the domicile of a wife generally follows that of the husband,—a rule which has now been abrogated in England by statute.[4]

Rules as to domicile.

2.7. One's domicile is fixed by the law. If one be a legally competent adult, one may establish a home which the law will say is one's domicile. This is called a domicile of choice[5] but it is a matter of free "choice" on the individual's part only because he has complied with the law's requirements for acquisition of a new domicile. If he has two homes, the law determines which of them is his domicile. If he has no home, the law designates a particular place as his domicile regardless of his choice in the matter. At the moment he is born, the law assigns him a domicile, called his domicile of origin. Minors, married women and persons deemed legally incompetent are, by law, each assigned a domicile which may, in turn, be changed by facts outside the individual's control.

Variation in rules.

2.8. The concept of domicile is, thus, one of a *legal relation between a person and a place*, created by the law and not by the persons. In other words, the factors of a person's life constitute domicile because the law so says. The law prescribes the constituents of domicile. If this is true, it must be expected that the exact requisites of domicile, i.e., its definition, may vary slightly according to the purposes for which the term is used. This variation may appear not only from state to state, but even in the same state. Since domicile is a "tool" concept, it will be fitted to the job for which a tool is needed.[6] It is conceivable that courts which purport to adhere to the idea of singleness of domicile might nevertheless find a person's domicile to be at one place for one purpose and at another place for another purpose. And, of course, different courts may find one's domicile to be at different places.

III. DOMICILE AND MATRIMONIAL JURISDICTION

Importance of domicile in relation to jurisdiction.

2.9. The importance of domicile in the context of matrimonial jurisdiction was established beyond doubt by the Privy Council in *Le Mesurier*,[7] holding that the Courts of *Ceylon* had no jurisdiction to dissolve a marriage unless the

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[1]*Bell* v. *Kennedy*, (1868) Law Reports 1 Sc. & Div. 307, 320.
[2]Sections 5 to 20, Indwian Succession Act, 1925.
[3]*Cf. Ratanshaw* v. *Bananji*, A. I. R. 1938 Bom. 238.
[4]Section 1, Domicile and Matrimonial Proceedings Act, 1973 (Eng.).
[5]Restatement (second) of Conflict of Laws (proposed Official Draft, 1967), section 15.
[6]See *Robes* v. *Kennedy*, 219 F. Supp. 892 (D. D. C. 1963).
[7]*Le Mesurier* v. *Le Mesurier*, (1895) A. C. 517 (P. C.).

parties were domiciled in Ceylon. This decision was construed as also implying that *English Courts* would have no jurisdiction to dissolve a marriage unless the parties were domiciled in England,—in the absence of special statutory provisions. The recent English Act of 1973,[1] dealing with jurisdiction in matrimonial causes, now specifically provides as follows:—

> "(2) The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if (*and only if*) either of the parties to the marriage—
>
> (a) is domiciled in England and Wales on the date when the proceedings are begun; or
>
> (b) was habitually resident in England and Wales throughout the period of one year ending with that date."

This provision, in a way, gives legislative effect to the concept of domicile as a basis for jurisdiction, though, as will appear from the section itself, it is no longer the exclusive basis.

2.10. Domicile in relation to recognition of divorce may now be dealt with. Domicile.

2.11. The question of recognition had been involved in earlier English cases,[2] and their reliance on the rule of the domicile was undoubtedly a factor in the case of *Le Mesurier*.[3] Recognition on the basis of domicile.

2.12. When, in 1834, Story formulated the domicile rule in the U.S.A., the state of domicile was the state "to which the parties belonged,"[4] the permanent domicile,[5] or the "actual domicile" *bona fide*.[6] The same conception appeared as late as 1883 in the eighth edition of his work.[7] Story's view.

2.13. In this connection, it is interesting to recall how the rule of domicile came into early English cases.[8] It can be traced back to Story,[9] and Story got it from some early Massachusetts decisions.[10] These cases arose under a Massachusetts Statute (Mass. Acts 1785) c. 69) which provided that divorce suits might be Early English cases.

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[1]Section 5(2), Domicile and Matrimonial Proceedings Act, 1973.

[2](a) *Rex* v. *Lolley Russ.* & Cr. Cas. (1812) 237, 168 Eng. Rep. 779;
(b) *Warrender* v. *Warrender,* (1835) 2 Cl. Fin. 438, 6 Eng. Rep. 1239 (H. L.);
(c) *Dolphin* v. *Robins,* (1859) 7 H. L. Cas. 390, 11 Eng. 156 (H. L.);
(d) *Shaw* v. *Could,* (1868) L. R. 3 H. L. 55;
(e) *Harvey* v. *Farnie,* (1882) 8 App. Cas. 43;
(f) *Manning* v. *Manning* (1871) L. R. 2 P. & D. 223.

[3]*Le Mesurier,* para. 2.6, *supra.*

[4](a) *Hopkins* v. *Hopkins,* (1807) 3 Mass. 158;
(b) *Carter* v. *Carter,* (1810) 6 Mass. 263 cited by Story 189.

[5]*Inhabitants of Honover* v. *Turner,* 14 Mass. 227, 231 (1817), cited by Story, (1834), 190,

[6]*Barber* v. *Root,* (1813) 10 Mass., 260 cited by Story (1834), 190.

[7]Story, Conflict of Laws (8th ed. 1883), para. 230.

[8]Is "*Haddock* v. *Haddock*" overruled? (1943) 18 Ind. L. J. 165. See also Cock, Logical And Legal Bases of The Conflict of Laws (1942), 467, 468.

[9]Story, Commentaries On the Conflict of Laws (1834), 228 et seq.

[10]See—
(a) *Richardson* v. *Richardson,* (1806) 2 Mass. 182;
(b) *Hopkins* v. *Hopkins* (1807) 3 Mass. 158.
(c) *Hanover* v. *Turner,* (1817) 14 Mass. 227.

brought in the country "where the parties live". The purpose was to remove divorce from the purview of the governor and council and place it within the purview of courts, because, in the words of the statute, "it is a great expense to the people of this state to be obliged to attend at Boston upon all questions of divorce, when the same might be done within the counties where the parties live."

The rule was appropriately based on considerations of convenience and it is not surprising that the English courts adopted it when they came to consider questions of divorce.

Domicile firmly established.

2.14. For some time, the test of residence prevailed as to recognition, but it ceased to be the law after the decision in *Le Mesurier*. In *Salvesen* v. *Administrator of Austrian Property*,[1] the majority view of *Niboyet's case* was formally overruled. "It is established that the law of England recognises the competence and the exclusive competence of the Court of domicile to decree dissolution of a marriage." The general rule is relaxed by certain statutory provisions. But, subject to the statutory exceptions, the main rule still prevails,[2] and has not been abrogated by the English Act[3] of 1971.

IV. NATIONALITY

Nationality.

2.15. In some of the countries on the Continent, the Courts exercise matrimonial jurisdiction on the basis of nationality, and it may be presumed that these countries adopt the same approach, as regards recognition also,—i.e., recognition of decrees of countries which are foreign countries for the purposes of those countries. They, therefore, recognise foreign decrees granted on the basis of nationality.

France and other countries.

2.16. In this connection, France is an outstanding example. Since the French Revolution and the introduction of Civil Code of France, its connecting factor of personal law changed. Domicile was superseded by *lex Batriae*—i.e., nationality[4] replacing domicile in regard to personal relations.

The French rule is followed in other civil law countries also. The most representative legislations of the civil law take into consideration the position of the law of the state whose nationals the parties are, with regard to one or both of the following points:

(i) Jurisdiction in the case of foreign nationals is not assumed, unless the national law of the parties is willing to recognize this jurisdiction.

(ii) Divorce is not granted, unless it is agreeable to the internal law of the national state of the parties.

Savigny's view.

2.17. However, it should be mentioned that the test of nationality has not always been favoured, even on the continent. Adverting to the variety of opinions among both writers and courts respecting conflicts of laws, Savigny nevertheless conceived that, from the exceptional and active common concern in the problems of this field of law, there would develop a universal community of

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[1]*Salvesen* v. *Administrator of Austrian Property*, (1927) A. C. 641, 685.

[2]*Dunn* v. *Sarba* (1955) Probate 178.

[3]See Chapter relating to 1971 Act, Chapter 10 *infra*.

[4]See also para. 2:19, *infra*.

legal understanding and legal life. The further suggestion that the *principle of nationality*, then coming into prominence, would not make itself felt in a subject, the nature of which involves the resolution of conflicts of national laws within a recognised community of the various nations, equally reflects Savigny's international point of view.[1]

But these anticipations of Savigny were soon to be disappointed. Two years after Savigny wrote, the doctrine of nationality, which in its exaggeration has so much contributed to international disorder during the past century, was proclaimed by Mancini as the fundamental principle of the law of nations, and shortly become the distinctive basis of legislation in continental Europe.[2]

2.18. Apart from continental countries, nationality is a valid criterion in a few others. For example, according to article 35 of the Brazilian Code[3], the personal consequences of the marriage are determined by law of the common "habitual residence" of the husband and wife ; but the Brazilian law applies if he is a *Brazilian citizen* or domiciliary. Provisions in Brazilian Code.

V. NATIONALITY—HISTORY

2.19. At this stage, a brief history of nationality in the context of conflict of laws would be of interest. Nationality as the basis of personal law is not older than the Code Nepoleon,[4] and has acquired its predominance in many countries of the civil law orbit only since the time of Mancini. Since then, in these countries the analysis of the concept of nationality has become one of the most important topics of conflicts law.[5] History.

On the other hand, the Commonwealth and the United States, like many civil law countries, have adhered to the ancient rule of domicile as distinguished from the comparatively new concept of nationality.

Even between countries of the English-speaking world, important differences have been created by the continued English emphasis on the *domicile of origin*,[6] in contrast to the domiciles of choice and domiciles by operation of law which are solely relevant in the U.S.A.

2.20. A remarkable advance has been conceded to the principle of "domicile" in recent international treaties. The Codige Bustamante[7] proclaimed international jurisdiction for divorce to be at the matrimonial domicile, in contrast with the general policy of the Convention not to specify the personal law and despite the protest of Brazil, which then followed the nationality principles.[8] The Franco-Italian Treaty of June 3, 1900, on the enforcement of Judgments (art. 11, part. 1) secured recognition for the decisions of the court of the Recent trend.

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[1]Professor Yntema, in Rabel, Comparative Conflict of Laws, (1958), Vol. I, Foreword p. xvi.

[2]Professor Yntema in Rabel, Comparative Conflict of Laws (1958), Vol. I, Foreword p. xxvi.

[3]Article 35, Brazilian Code on Private International Law: De Nova, "Development of private International Law" (1964) 13 American Journal of Comparative Law 452, 561.

[4]*Cf.* para. 2.16, *supra.*

[5]Rabel, Comparative Conflict of Laws, Vol. I, page 161-172 discusses the various rationalie (tradition, politics, econmics, practicability), and at 171, the short-comings of the nationality principle.

[6]Rabel, Comparative Conflict of Laws, (1958), Vol. I, page 118.

[7]Article 52, Bustamante Code.

[8]Rabel, Comparative Conflict of Laws (1958), Vol. 1, page 532.

domicile or, in their absence, decisions at the residence of the defendant, without excepting matters of status, and the same devices have been adopted in other European treaties,[1] despite the fact that all the countries involved are traditional-followers of the nationality principle.

Scandinavian law.

2.21. In the "Scandinavian Union"[2] as to family law,[3] signed by Sweden, Norway, Denmark, Finland and Iceland, the principle of nationality has been replaced by a reference to the law of an individual's domicile,—which recognises that the life of a person centres largely around the country of his domicile.[4]

Venezuelan draft.

2.22. It may be noted[5] that the most striking feature of the Venezulean draft on Conflict of law is that *nationality is replaced by domicile* as a connecting factor in matters of personal law. "This shift emphasises the steady loss of favour that the idea of the *lex patrias* has suffered since the war, both in legislative workshops and in scholarly circles."[6]

2.23. It has been stated[7] that an even more portentous sign of this crisis of nationality as a criterion for jurisdiction and choice of law is the challenge and keen competition that it faces from "habitual residence"[8] at the latest Hague Conference.

"Residence habituelle", it is stated, is domicile in modern garb, for international consumption.

International Conventions—Habitual residence an emerging test.

2.24. In 1960, during the debates that took place at the ninth session of the Conference on the subject of guardianship,[9] and in 1963, when a group of experts worked out a preliminary draft on adoption,[10] and again in 1964, at the tenth session of the Conference, when a text on international adoption was agreed upon, some sort of balance was struck between the competence of the courts and the law of the country of nationality, and the competence of the courts and the law of the country of habitual residence. But the scales were often tipped in favour of the latter.

VI. RESIDENCE

Residence.

2.25. The next criterion to be considered is that of residence. In India, this criterion is not in force as a basis of jurisdiction in divorce, but it should be noted that the Indian Divorce Act, 1869, section 2, was, for some time, construed as empowering the Courts to grant a divorce if the parties were resident in India. This is not the law now[11] under that Act, in regard to dissolution of marriage,—though it continues as to nullity under that Act.

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[1](1934) 153 League of Nations Treaty Series page 135, 141.

[2]Convention on Marriage, Adoption, and Guardianship, of Feb. 6, 1931, 5 Hudson. International Legislation 877 (1936), Convention on Inheritance and Succession of Nov. 19, 1934, 6 Hudson 947 (1937).

[3]See J. P. Niboyet, Professor of Private International Law, Paris, "Territoriality in the Conflict of Laws" (1952) 65 Harvard Law Review, 582-583.

[4]Rabel, Comparative Conflict of Laws (1958), Vol. 1, page 33, Note 85.

[5]De Nova, "Developments of Private International Law" (1964) 13 A. J. C. L. 542, 562.

[6]De Nova, "Developments of Private International Law", (1964) 13 A. J. C. L. 542, 562.

[7]De Nova, "Developments etc." (1964) 13 A. J. C. L. 542, 560, R. H. Groveson, "Comparative Aspects of the General Principles of Private International Law", Academic de Droit International, 109, Recueil des Cours (1963, 2) 7, at 68 ff.

[8]Para. 2. 30 et. seq. *infra.*

[9]A. See R. De Nova, "Le IX Conference dell 'Aja," 14 Diritto Internationals (1960) 305, at 309 ff.

[10]See R. De Nova, "Il progette preliminare dell' Aja aull' adozione internationale," (1963) 17 Diritto Internationale 199.

[11]See Chapter 5, *infra.*

In section 20(c) of the Code of Civil Procedure, 1908, and in section 19, Hindu Marriage Act, 1955, the test of residence does occue, as a basis for the exercise of jurisdiction in respect of matters dealt with by those provisions. The applicability of section 19, Hindu Marriage Act to cases involving a foreign element is a matter which we shall reserve for later discussion.[1]

2.26. Residence does not require an intention to settle down. It has been pointed out[2] that it is not even necessary to have a roof over one's head, and a nomad can be a "resident" in a country within which he wandered. **Intention not required.**

2.27. "Residence" has always been regarded as essentially a physical fact.[3] The combined effect of two decisions of the House of Lords,[4-5] rendered in taxation law, is that "ordinary residence"[6] is the reverse of "extraordinary"—some residence which is "according to the way in which a man's life is usually ordered" (Lord Warrington)— "part of the ..... order of a man's life adopted voluntarily and for certain purposes (Lord Summer)—not casually but in the ordinary course of his life." This is also clear from the analysis of the subject by a scholar.[7-8] **Residence a physical fact.**

2.28. In India, the expression "reside" has been construed by the Supreme Court in *Mst. Jagir Kaur* v. *Jaswant Singh*.[9] The question that came up for decision was as to what the word "resides" and the words "where he last resided with his wife" mean, in section 488(8) of the Code of Criminal Procedure,[10] which gave a right, *inter alia*, to the wife to file a petition for maintenance before the competent Magistrate. While dealing with this case, the Supreme Court observed as below: **Meaning of residence.**

> "A makes only a flying visit and he has no intention to live either permanently or temporarily in the place he visits. It cannot, therefore, be said that he 'resides' in the places he visits."
>
> Earlier in the judgment, it was also observed that:
>
> "Whichever meaning is given to it, one thing is obvious and it is that it does not include a casual stay in, or a flying visit to, a particular place. In short, the meaning of the word would, in the ultimate analysis, depend upon the context and the purpose of a particular statute. In this case the context and purpose of the present statute certainly do not compel the *importation of the concept of domicile in its technical sense*. The purpose of the statute would be better served if the word 'resides' was understood to include temporary residence."

These observations are of interest, as pointing to the distinction between residence and domicile.

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[1]See Chapter 5, *infra*.

[2]*Internal Revenue Commissioner* v. *Lysaght*, (1928) A. C. 234, 244 (Viscont Summer).

[3]*Ramsay* v. *Liverpool Royal Infirmary*, (1930) A. C. 588, 597 (Lord Macmillan).

[4]*Levenvire* v. *Internal Revenue Commissioner*, (1928) A. C. at page 225.

[5]*Internal Revenue Commissioner* v. *Lysaght*, (1928) A. C. 234, 242, 243, 248.

[6]See further para. 2. 29, *infra*.

[7]Farnworth, in 67, L. Q. R. 32, 34.

[8]Farnworth, "Residence in the Anglo-American Law", 38 Crotius Society Transactions 29.

[9]*Mst. Jagir Kaur* v. *Jaswant Singh*, A. I. R. 1963 S. C. 1521.

[10]Now, section 125, Cr. P. C. 1973.

VII. ORDINARY RESIDENCE

Ordinary residence.

2.29. The next expression relevant to the question under discussion is "ordinary residence",—an expression which one meets with in taxation law.[1] Ordinary residence should be residence in the ordinary course of the man's life, not exceptional or accidental. Here again, intention as such is not material, except in-so-far as it may indicate whether the residence is exceptional or accidental.

VIII. HABITUAL RESIDENCE

Habitual residence.

2.30. "Habitual residence" is a more precise ground than residence, and requires to be considered at some length.

History.

2.31. The expression "habitual residence" was first employed internationally[2] as long ago as 1902.[3] The concept has also been employed in Convention sponsored by the League of Nations, the United Nations and the Council of Europe.

In the *Nottebohm case*,[4] the International Court of Justice stressed the importance of habitual residence, where the question was whether the State of Liechtenstein could confer nationality on a person habitually resident in Guatemala.

English provision.

2.32. "Habitual residence" has been employed in English statutes relating to succession,[5] adoption,[6] contrast[7] and divorce and legal separation.[8-9-10].

The limits of the concept have been explored academically.[11]

Recent case.

2.33. With reference to this expression (habitual residence) as used in the Recognition of Divorces etc. Act, 1971, section 3(1)(a), the judgment of Lane J. in *Cruss* v. *Chittum*[12], is of interest. We shall discuss it later.[13]

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[1]See para. 2.27, *supra*.

[2]Hague Convention on Guardianship (June 12, 1902), Article 2.

[3]See K. Lipstein, "The Tenth Session of the Hague Conference on private International Law" (1965) Camb. L. J. 224, 225, n. 3.

[4]*Nottebohm case*, (Second Phase) (1955) I. C. J. Rep. 4:22.

[5]Section 1, Wills Act, 1963, s. 1.

[6]Section 11(1) Adoption Act, 1968, [following Hague Convention on Adoption 1964, Arts. 1, 2(b)].

[7]Section 7(1), Supply of Goods (Implied Terms) Act, 1973.

[8](a) Section 3(1) (a), Recognition of Divorces and Legal Separation Act, 1971 (following Hague Convention on Recognition 1969, Art. 2);

(b) Domicile and Matrimonial proceedings Act, 1973, s. 5(2).

[9]Para. 2:33, *infra*.

[10]See also Administration of Justice Act, 1956, Sections 3(8) and 4(1)(a).

[11](a) R. H. Graveson, The Conflict of Laws (6th ed., 1909), pp. 195, 512;

(b) K. Lipstein in (1965) Camb, L. J. 224, 225-227;

(c) J. Hom. "The Adoption Act, 1968 and the Conflict of laws", (1973) 22 I. C. L. Q. 109, 134-136;

(d) J. D. McClean and K. W. Patchett, "English Jurisdiction in Adoption" (1970) 19 I. C. L. Q. 1, 14-16.

[12]*Kruse* v. *Chittum*, (1974) 2 All E. R. 940, 942, 943.

[13]Para. 2:34, *infra*.

The judgement in *Indyka* v. *Indyka*[1] may also be seen as establishing a possible test of habitual residence. There, "Each of their Lordships expresses much the same broad view of what should be the new recognition rule, although stating it in quite different terms," as was observed by Ormrod J. in *Angelo* v. *Angelo*.[2]

2.34. In *Kruss* v. *Chittum*[3] Lane J. accepted the formulation by counsel of certain features of habitual residence with reference to the Act of 1971. They were as follows:

(i) Habitual residence indicates "a quality of residence rather than period of residence".

(ii) "Habitual residence" is similar to the residence normally required as part of "domicile", although in habitual residence there is no need for the element of animus which is necessary in domicile.

(iii) The phrase in the Mississippi decree in the case, (which was in issue) that residence was "actual and bona fide," really defines habitual in this context, and denotes "a regular physical presence which must endure for some time."

(iv) Some characteristics of residence negate the possibility of its being habitual,—for example, if it is of "a temporary or a secondary nature".

(v) "Habitual residence requires an element of intention, an intention to reside."

(vi) Ordinary residence is different from habitual residence, "in that the latter is something more than the former".

With respect, it may be stated that some of these propositions may require further consideration—particularly, the last one.

2.35. The criterion of habitual residence may sometimes coincide with other criteria. An example, though not from the field of matrimonial law, may be cited. In *Attaullah's case*[4], in the context of the position of inhabitants of coded territories, it was observed by the Calcutta High Court:—

Habitual residence may coincide with other criterion.

"In some cases, therefore, an option is stipulated in favour of the inhabitants of the ceded territory and thus avert the charge that inhabitants are handed over to a now sovereign against their will.

"The terms of option may vary from case to case, but the general principle applied has been that a person *habitually resident*[5] in a ceded territory acquires *'ipso facto'* the nationality of the State to which the territory has been transferred, and loses the nationality of the ceding State" (page 506-Oppenheim).

"From the principle referred to above, it will be significant that a person *habitually resident*[6] within a particular ceded territory acquires *'ipso facto'* as a result of the cession, the nationality of the State to which the territory is transferred."

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[1] *Indyka* v. *Indyka*, (1969) 1, A. C.

[2] *Angelo* v. *Angelo*, (1968) 1 W.L.R. 401, 403.

[3] *Kruse* v. *Chittum*, (1974) 2 All. E. R. 940, 942, 943.

[4] *Attaullah* v. *Attaullah*. A. I. R. 1953 Cal. 530, 533 (per R. P. Mookerjee, J.).

[5] Emphasis supplied.

[6] Emphasis supplied.

CHAPTER 3

LAW APPLIED BY COURTS

I. INTRODUCTORY

Scope of the Chapter.

3.1. In this Chapter, we shall briefly deal with the law which is applied when a Court dissolves a marriage. A consideration of this aspect is relevant to the question of recognition of divorce.

Questions that usually arise.

3.2. Three questions are usually discussed in dealing with the problems arising in the field of conflict of laws—

(1) Bases of jurisdiction.

(2) Choice of law.

(3) Recognition.

We have dealt, in a general way, with the first.[1] We propose now to discuss the second ; the specific question to be considered in this context is how far, for the purpose of recognition, it should be a pre-requisite that the law of the recognising forum was applied by the foreign court.

In other words, *besides* the criterion of existence of the requisite basis of jurisdiction (habitual residence, nationality or domicile), should it also be necessary that the foreign court must have applied the law in force in the country where recognition is sought ?

General statement of the position in India, England and USA.

3.3. At the outset, we may, by way of introduction, state that in India, as well as in England[2] and in the United States[3], the "jurisdictional approach", and the ensuing identity of *forum* and lex, have been long accepted as a matter of course, as regards divorce. Therefore, if an Indian or English Court exercises jurisdiction to dissolve a marriage, it applies the Indian or English law, as the case may be, in the absence of special statutory provisions to the contrary. The position is not different in other countries in the Commonwealth.

However, as a theoretical examination of the position on the subject might be helpful, we shall, deal with a few important aspects, before reverting to the English law.

II. CHOICE OF LAW—GENERAL ASPECTS

Transactions involving contracts with more than one State.

3.4. Where a transaction involves contacts with more than one State, the determination of the law applicable to the transaction may present problems. "The extra-forum" element is sometimes taken into account, and sometimes not. General observations by text-book writers on the conflict of laws draw attention to this aspect ; but, those observations do not imply that in *every case* involving an extra-forum element, the foreign law must be applied. The answer to the question whether foreign law should be applied, and, if so, *which* foreign law should be applied, may depend on the nature of the cause of action, the relief sought and many other factors.

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[1] Para. 2:19 to 2:35 *supra.*

[2] *De Nova,* "Developments of Private International Law, (1964) 13 American Journal of Comparative Law.

[3] *De Nova,* "Developments of Private International Law, (1964) 13 American Journal of Comparative Law.

Moreover, where the relief sought is governed by statutory provisions, those provisions cannot be ignored. It is suggested that the correct approach is first to peruse the relevant enactment. If there is an enactment on the subject, its territorial scope must then be ascertained. No doubt, there is a judicial tradition to "read down" wide statutes, so as to avoid extra-territorial application where necessary. However, what requires to be emphasised, is that the text of the applicable enactment cannot be totally disregarded.

If this process fails to yield a conclusion based on convincing reasons, then, no doubt, it is legitimate to inquire whether any other system of law should, *having regard to the nature of the cause of action and the relief*, and other relevant considerations, be taken into account.

It is not in every case that foreign law becomes the governing law merely by reason of some foreign element. A court of a country would be bound to apply the law of its own legislature, unless it is found that by the rules of private international law or of the rules relating to the construction of statutes, that law is not applicable.

3.5. Where there is no domestic statute on the point which possesses an express or implied territorial scope embracing the particular case, and the court is faced with a case involving an extra-forum element, the court generally applies the principles of private international law to determine the governing law. A foreign statute will be relevant, if it is a part of the legal system whose law is applicable by virtue of the *choice of law rule* of the forum. But—to repeat what has already been stated above[1]—it is not in every case that the law of the forum will be displaced by the foreign law.

Possible systems of law.

3.6. The possible systems of law applicable,—to mention the important ones, — are:

(a) law of nationality; or

(b) law of domicile in modern times habitual residence;

(c) law of place of celebration of marriage, where the question arises out of marriage;

(d) law of place where the matrimonial misconduct was committed;

(e) law of the forum

Marriage—validity of.

The Court of the forum has to decide whether it should apply its own law system (e) above—thus disregarding all foreign laws—or whether it should regard any other system of law as applicable out of systems (a) to (d) above. The answer to this question depends on a variety of factors.[1]

3.7. It should first be stated that *on some topics*—other than divorce,—the foreign law may be appropriately considered by a court. For example, the position as to the choice-of-law rule in regard to the *validity of marriage*, has been defined as follows[2]:—

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[1]Para. 3.4 *supra*.

[2]Mendes da Costa, "The Formalities of Marriage", page 257, referred to in "Temporal dimensions in the conflict of laws" (1963) B. Y. B. I. L. 122.

"The formal validity of a marriage is referred to the *lex loci celebrationis* as is deemed to have existed at the date of the marriage or by the *lex loci celebrationis* as it stands when the validity of the marriage is called into question, either because a second ceremony of marriage is entered into, or because the issue is raised by a court of competent jurisdiction."

Torts.

3.8. Then, as regards torts, sometimes the foreign law has to be considered. Many laws of the United States and of other systems, save the British, refer to the *lex loci delicti commissi* as the primary measure and standard of liability in tort cases.—subject, of course, to the limits set up by the forum as to questions of procedure and public policy.[1]

English law, following *Willes J. in Phillips* v. *Eyre*[2], took the position that to be actionable in English forum, the foreign tort must both be an act—(a) which, if done in Britain, would be a tort, and (b) which is *not justifiable* according to the law of the foreign country[3] where it was committed. Recently[4], the requirement has been modified, and it should read—"which is *actionable* according to the foreign law."

This rule has frequently been criticised, and it seems to be generally regarded as a 'rigid rule of secure, though very unhappy standing'.[5] Professor Yentema[6] even maintains that this English doctrine involves a 'gratuitous misconstruction' of the opinion of Mr. Justice Willes[7], thus constituting an 'isolated and irrational' position in law.

Law in America.

3.9. The American view, in regard to torts, is that the *lex loci commissi* governs. In the *American Banana Co.* v. *United Fruit Co.*[7] the U.S. Supreme Court said, "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done".

3.10. In this connection, the following famous passage in Justice Holmes's opinion in the case of the *American Banana Co.* v. *United Fruit Co.*,[8] may be cited—

"In the first place, the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States, and within that of other States. It is surprising to hear it argued that they were governed by the act of Congress.

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[1]*See*—

(a) Yntema, 'Dicey: An American Commentary', 4 International Law Quarterly;

(b) Rabel, Conflict of Laws (2nd ed., 1960), Vol. 2, pages 235-236;

(c) Justice Holmes, in *Cuba R. Co.* v. *Crosby* (1922) 222 U. S. 473, 477 (1914); and

(d) Justice Holmes, in *Western Union Telegraph Co.* v. *Brown*, (1914) 234 U. S. 542, 547.

[2]*Phillips* v. *Eyre* (1870) L. R. 6 Q. B. 1, 28, 29.

[3](1963) British Year Book of International Law page 117.

[4]*Chaplin* v. *Boys* (1971) A. C. 356 (H. L.).

[5](a) Rabel, Conflict of Laws, page 239;

(b) Inglis, Conflict of Laws (1959), page 476 ('notion not justifiable, far from satisfactory');

[6]Yntema in (1949) 27 Canadian Bar Review, pp. 116-22 and in (1951) 4 International Law Quarterly, pp. 8-9.

[7]*American Banana Co.* v. *United Fruit Co.* (1909) 213 U. S. 347, 355, 356, 357 (Holmes J.).

[8]*American Banana Co.* v. *United Fruit Co.* (*Supra*).

"The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done ..... For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign "contrary to the comity of nations, which the other state concerned justly might resent. .....

"..... The foregoing considerations would lead in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the law-maker has general and legitimate power. 'All legislation is *prima facie* territorial'. (Citing cases). Words having universal scope, such as 'every contract in restraint of trade', 'every person who shall monopolize', etc. will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute (the Sherman Act), the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue .....

"For again, not only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place and therefore were not torts at all, however contrary to the ethical and economic postulates of that statute."

It may be noted that even as regards tort, recent trends are in the direction of not adhering very rigidly to the rule in *Philip* v. *Eyre*.[1] It is sufficient to refer to two decisions,—one of the House of Lords[2], and the other of the High Court of Australia[3],—which show the emphasis placed on the law of the forum in regard to certain aspects (for example, the quantum of damages in the House of Lords case).

Contracts.

3.11. As regards contracts, the general principle is that the proper law of a contract is that legal system which is to govern the obligations of the parties by virtue of the particular contract. In England[4], and in some other common law jurisdictions[5] also, it is the law which the parties have either expressly or by implication chosen to govern their contractual relations. Thus, intention is the connecting factor.

There are other cases also where foreign statutes have been applied to regulate contracts, where they formed part of the *governing state's law*[6].

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[1]*Philips* v. *Eyre*, (1870) Law Reports 6 Q. B. 1. 28, 29, para. 3.8, *supra*.

[2]*Chaplin* v. *Boys*, (1971) A. C. 356 ; (1969) 2 All E. R. 1085 (H. L.).

[3]*Anderson* v. *Eric Anderson*, (1966) 114 C. L. R. 20 (Australia).

[4]See *Mount Albert Borough Council* v. *Australasian Temperance Society*, (1938) A. C. 224, 240 (per Lord Wright) ; *Re. Claim by Helbert Wagg & Co. Ltd.*, (1956) 1 Ch. 323, 340.

[5]See (1963) B. Y. B. I. L. page 134.

[6]*See* for example, *In re. Claim by Halbert Wagg & Co. Ltd.*, (1956) 1 Ch. 323 (German Moratorium Law applicable to a contract the proper law of which was German) ; *Kahler* v. *Middland Bank Ltd.*, (1950) A. C. 24 (Czechoslovak legislation applicable to a contract governed by Czechoslovak law) ; *R.* v. *International Trustee for the protection of Bondholders Aketiengesellschaft*, (1937) A. C. 500 (U. S. Congressional Resolution having the force of law applicable to a contract governed by American law).

Present inquiry not concerned with tort or contract.

3.12. But we are not concerned with the question of proper law of tort or contract. The precise question to be considered is,—what law is applied by the courts when granting dissolution of marriage ?

We proceed to consider this question, first with reference to the Indian law[1] ; and then with reference to English[2] and American law.[3] Thereafter, we shall consider the question whether any change is needed.

III. INDIAN LAW

Decisions under the Indian Law.

3.13. As regards Indian law, we shall first refer to the Act applicable to Christians. There are numerous decisions under the Indian Divorce Act, 1869, where the courts in India have granted divorce on the basis of a ground specified in that Act, *irrespective of the question whether that ground was, or was not, recognised as a ground of divorce in some other country* having a connection with the marriage, such as, the country where the marriage was solemnised[4], or where the matrimonial misconduct took place[5] or the country of the nationality of the parties[6].

3.14. A study of the following illustrative cases under the Indian Divorce Act relating to divorce or judicial separation, shows that the grounds of relief were taken as entirely governed by the Indian law, even though a foreign element was involved. Existence of the requisite head of jurisdiction was considered enough:

SELECTED CASES ON THE INDIAN DIVORCE ACT

1. *Hartencia* v. *John Sebastian*, A.I.R. 1935 Bom. 121 (Beaumont, C.J.).
   (Parties lived in Bombay together—Then went to Nairobi—Wife returned to Bombay—Judicial separation granted—Foreign law not considered).
2. *Rose Hill* v. *Luck C. Hill*, A.I.R. 1923 Bom. 284, 285 (Adultery of wife on ship at Marseilles was enough to justify grant of divorce).
3. *W.D.* v. *E.D.*, *A.I.R.* 1933 Sind 27.
   (It was observed that the parties must have been married under the 1872 Act, but this was *obiter*).
4. *Mrs. Nan Greenwood* v. *L. V. Greenwood*, A.I.R. 1928 Oudh 218(1), (Pullan, J.).
   (Parties not domiciled in India—Married in Ireland—Divorce granted).
5. *Giordano's case*, (1912) I.L.R. 40 Cal. 215 (Italian couple).[7]

5A. *Shireen Mall*[8], A.I.R. 1952 *Punj.* 277.

6. *Bright* v. *Bright*, I.L.R. 36 Cal. 964.
7. *Grant* v. *Grant*, A.I.R. 1937 Pat. 82.
   (Adultery outside India—Parties domiciled in India).

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[1]Para. 3.13, *et seq. infra.*
[2]Para. 3.20, *et seq. infra.*
[3]Para. 3.33A, *et seq. infra.*
[4]*Rose Hill's case*, (para. 3.14, *infra.*).
[5]*Mrs. Nan Greenwood's case*, (para. 3.14, *infra.*)
[6]*Giordano's case*, (para. 3.15, *infra.*).
[7]See para. 3.15, *infra.*
[8]See para. 3.16, *infra.*

3.15. In *Giordano's case*[1], the husband was an *Italian subject*, with an Italian domicile, and instituted proceedings in India for divorce on the ground of his wife's adultery. The marriage had been solemnised in India, and the parties were residing in British India. (As the Indian Divorce Act then stood, residence was enough to confer jurisdiction for dissolution).

It was held that under the provisions of the Indian Divorce Act, the Court was bound to grant a divorce on proof of adultery, although the divorce would have no effect outside India. It may be noted that Italy had no provision for divorce at that time.

2.16. In *Shireen Mall's case*[2], the respondent husband was a British soldier, though temporarily he lived in British India. The High Court observed that only the Indian law was applicable. Section 7 of the Indian Divorce Act, 1869 (Court to follow the English practice) made no difference, because it was expressly stated to be—"Subject to the provisions contained in this Act. ....."

The High Court added—

> "Hence, if the provisions which are given in section 10 of this Act give only certain ground on which a marriage can be dissolved, I am of the view that the grounds of dissolution of marriage *cannot be extended by virtue* of section 7 to grounds which might be prevailing for the time being in England. I, therefore, must hold that the provisions of the amended section 176 of the Act prevailing in England (Supreme Court etc. Act, 1925), which allow dissolution of marriage on the ground of desertion of the wife by the husband without cause for a period of three years or upwards would not apply to this country. In *this country*, "desertion by a husband of his wife without cause would be a ground for dissolution of marriage if the desertion is for a period of two years and upwards and is coupled with adultery."

No doubt, in this case, the marriage was found to be void, but the above dicta show the trend.

3.17. Thus, it is clear that in various decisions under the Indian Divorce Act, 1869[3], Indian courts have, while exercising their jurisdiction under that Act, confined themselves to a consideration of the grounds of divorce as *given in that Act*. Of course, the proceedings must be within their competence, and, in this regard, the test laid down in section 2 of the Act must be satisfied. But, once the court in India is competent to exercise jurisdiction under section 2 of the Act, then the grounds for relief are to be sought only in that Act. **Indian decisions.**

3.18. It may be stated that the Indian and Colonial Divorce Jurisdiction Act, 1926[4], empowered courts in India or elsewhere in His Majesty's dominions, as laid down by order in council, to grant divorce to persons domiciled in the United Kingdom as if they were domiciled in the territory in question. While domicile was, thus, nominally or notionally, retained as the basis, jurisdiction was exercisable on the ground of residence of the petitioner at the time of presenting his petition and of the last residence together by the parties. The substantive law to be applied was the English law. This very provision, which is exceptional, in character, helps to bring out clearly the general rule. **Act of 1926.**

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[1] *Giordano* v. *Giordano*, (1912) I. L. R. 40 Cal. 215.

[2] *Shireen Mall* v. *Tayler*, A. I. R. 1952 Punj. 277, 279 (Soni, J.). (British soldier).

[3] Chapter 6, *infra*.

[4] 3 Halsbury's Statutes (2nd Edn.) 1158.

Hindu Marriage Act.

3.19. It may, next, be noted that under the Hindu Marriage Act[1], the fact that the marriage was performed outside those territories or the matrimonial misconduct took place outside those territories, is immaterial. In other words, once it is established that the parties are Hindus and are domiciled in India, the provisions of the Act relating to matrimonial relief come into play. The Act does not contain any express provisions as to choice of law ; but it appears that relief has to be given *according to,* and *only according to,* the provisions of the Act, if the proceedings are filed in India and if the Court in India is otherwise competent. Had the legislation intention been different, the legislature would have said so.

We do not pause to discuss in detail the provisions of the Special Marriage Act and other laws ; but it would be enough for our purpose to state that that Act and other laws relating to marriage and divorce, do not provide for applying a foreign law.

Dissolution of Muslim Marriages Act, 1939.

3.20. It may be noted that the Dissolution of Muslim Marriages Act, 1939, does not impose any restriction that the marriage to be dissolved at the instance of the wife under that Act should have been solemnised in India, or that the matrimonial misconduct which constitutes the basis of the relief sought by the wife should have occurred in India. In substance, it is enough if the parties are governed by Muslim law. It may be presumed that by "Muslim law" is meant that portion of the Islamic law which is applied in India to Muslims as a personal law.

IV. ENGLISH LAW

General rule as to divorce.

3.21. So much as regards Indian law. The general rule in England is that in proceedings for divorce properly brought in England, English law, as in force at the time of the proceedings, exclusively governs the grounds of divorce. Other factors, such as—

(a) the law under which the parties were married,

(b) the national law of the parties, or

(c) the law of the place where the matrimonial offence was committed, are completely irrelevant, according to English practice. There may be a statutory modification of this position, but, apart from statute, this is the general rule.

A case of divorce.

3.22. Thus, in the case of *Zanelli* v. *Zanelli*[2], an Italian national married, in 1948, an English woman in England, where he was then domiciled. He was later deported from England, and thereupon reverted to the Italian domicile. The Englishwoman was granted a divorce in England by an *application of the English law* despite the rule of Italian law (the law of her domicile at that time), which disallowed divorce.

Position as to Nullity.

3.23. The position regarding proceedings for nullity of marriage may be different. An action or proceeding for the annulment of a marriage differs from a divorce proceeding, in that the latter is instituted to sever a *marriage relation admitted to exist,* whereas an annulment proceeding is for the purpose of declaring judicially that, because of some *disability or defect which existed at the time of the marriage ceremony,* no valid marriage ever took place between the parties, or that no valid marriage relation ever existed between the parties. An annul-

[1]Sections 1(2), 2 and 10 to 13, Hindu Marriage Act, 1955.

[2]*Zanelli* v. *Zanelli,* (1948) 92 Solicitor's Journal 646 (Court of Appeal). Cheshire, Private International law (1970), page 354.

ment is also to be distinguished from a divorce in that, as a general rule, an annulment proceeding is based on factors justifying the avoidance of the marriage *existing at the time of the marriage*, whereas a divorce is ordinarily for the causes arising after the marriage,—although some statutes, in defining grounds for annulment or divorce, do not adhere to these distinctions.[1]

3.24. We are not concerned with the law applicable to nullity proceedings. But, as regards divorce, the general rule is as stated above. The rationale[2] of the English rule seems to be that the question whether the court will dissolve a marriage is one that must be decided by "English conceptions of morality, religion and public policy"[3] and is "one that is governed exclusively by rules and conditions imposed by the English legislature". Rationale.

It is immaterial that the facts constituting the ground took place outside England.[4]

Wolff[5] states the position clearly, in this regard—

> "The English court, when entertaining divorce or separation proceedings, applies nothing but English law, because the question of the conditions under which the nuptial tie may be loosened or destroyed touches fundamental English conceptions of morality, religion, and public policy. There can, therefore, be no doubt that where in exceptional cases, the English court is not the court of the domicile, it is nevertheless English law that applies and not the law of the foreign domicile."

3.25. Conversely, if a foreign divorce is jurisdictionally valid, it will be recognised in England, notwithstanding that the foreign divorce was obtained on a ground not recognised by English law.[6] Foreign divorce recognised even if ground not valid in England.

Successive editions of Cheshire have consistently taken the view that in a suit for divorce brought in England, the substantive law of the forum must be applied without exception.[7] In the overwhelming majority of cases, jurisdiction being based on domicile, the courts have never been asked to decide specifically whether they apply English law as the *lex domicilii* or as the *lex fori*. Nevertheless, such case law as is available establishes this position beyond doubt. English jurisdiction and divorce law will be available even if the matrimonial misconduct on which the petition is based took place in a foreign country where the parties were then domiciled. Consequently, it is regarded as equally immaterial that the misconduct constituted no ground for divorce at the time of its commission if, in fact, it is a ground for divorce in the subsequently acquired English domicile at the time of the suit.

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[1] American Jurisprudence, 2nd Ed. Vol. 24, pages 177, 178.

[2] See also para. 3.42 *infra*.

[3] Wolff, Private International Law (1950), page 374, quoted also by Cheshire in his 1975 edition at page 353, 369.

[4] *Czepok* v. *Czepok*, (1962) 3 All England Reports, 990, 992 (Desertion outside England).

[5] Wolff, Private International Law (1950), pages 373-374.

[6] (a) *Indyka* v. *Indyka* (1969) 1 A. C. 33, 66, 73-74; approving *Bater* v. *Bater*, (1966) Probate 209;
(b) *Tijanic* v. *Tijanic*, (1963) Probate 181, 184;
(c) *Brown* v. *Brown*, (1968) Probate 518; (1968) 2 All E. R. 11.

[7] (a) Cheshire, Private International Law (6th ed., 1961), p. 393 cited in (1963) British Year Book of International Law at p. 127-128;
(b) Cheshire, Private International Law (1970), pages 353 to 368, and (1975) pages 369-87.

Wilson's case.

3.26. In *Wilson* v. *Wilson*,[1] the question was whether an English Court had jurisdiction to grant Wilson's suit filed in 1871 for the dissolution of his marriage on the ground of his wife's adultery. Wilson was a Scotsman married in Scotland to a Scottish wife, and was a partner in a business carried on at Glassgow. After their marriage, Wilson and his wife resided near Glassgow. Wilson held also a lease of some land near Loch Lomond, where he had built a shooting lodge. On discovering his wife's adultery in 1866, Wilson broke up his establishment and went to London, where he lived thereafter with his mother. He continued to draw an income from his business in Glassgow and when the subscription of his club fell due, Wilson begged his partner to pay the amount and wrote to his partner that he did not wish to dissocite himself entirely from Glassgow. He renewed the lease of the land on which he had his shooting lodge and spoke of it as the land of his father. The only property which Wilson possessed, it was shown, was in Scotland, and in London he was mainly supported by his mother. A Court in Scotland had held that Wilson had never acquired an English domicile. Wilson himself asserted, when giving evidence, that when he went to live in London in 1866, he did so with the intention of making England his home for the future. Lord Penzance stated that if Wilson had been dead and nothing were known of his intention, except what could be gathered from the more circumstances attending his residence in England, the evidence would not have been sufficient to enable the Court to arrive at the conclusion that he had adopted an English domicile. But he said:

3.26-A. "Still, when the man is here, and when he swears that his intention was to adopt an English domicile, why should he not be believed in the absence of any circumstances in the case tending to show that what he says is not true or likely to be true ? In this case, then, the question is not so much whether the circumstances of his English residence tend to prove English domicile, as whether, notwithstanding the man's oath to his intention to create an English domicile, there are sufficient circumstances on the other side to warrant the Court in throwing over his oath and disbelieving him. I am not aware there are any such circumstances."

"Well, I do believe him, and if I believe he came to England with the intention of permanently giving up his connection with Scotland, and fixing upon England as his future home, is there any question but that a new domicile was thereby constituted ? I apprehend not."

This question was, thus, consideted at length. But the jurisdiction having been established, the substantive law applied was the English law.

3.27. It was observed by the High Court[2] in *Mezger* with reference to a foreign decree of divorce as follows:—

"It is quite true that this decree was pronounced on grounds which are not recognised in this country. As I have said, the record is full and clear and it appears that it was pronounced on the ground that by insulting behaviour and incompatibility of temper, and other matters of that sort, the wife had failed to fulfil her marriage obligations—quite plainly a ground that is not recognised in this country—which the court below was assured has not been challenged here. That was the foundation for a divorce in the country where the divorce was pronounced and to the courts of which country these parties were

[1] *Wilson* v. *Wilson* (1872) 2 P. & D. 435; 27 L. T. 351; 41 L. J. P. & M. 74; 20 W. R. 891.

[2] *Mezger* v. *Mezger* (1936) 3 All E. R. 130, 134 (Refusal by Magistrate to revoke order for maintenance.).

amenable. In those circumstances, in my opinion, the justices have got nothing whatever to do with the question whether the grounds for divorce are recognised in this country or whether they approve of them or do not approve of them. The matter was put with characteristic terseness and accuracy by Hill, J., in the case of *Pastre* v. *Pastre*.[1] The case was somewhat similar though not exactly the same as this case. The question was, this court having pronounced a decree of judicial separation with the consequential allowances, whether that should be allowed to survive a decree of divorce pronounced by a French court. HILL, J., said this at p. 82.

The decree of the French court was made upon a ground which would not be a good ground here—namely, the existence for three years of a decree of judicial separation. But it is the decree of a court of competent jurisdiction in a proceeding in which the wife was an active party.

I stress those words. "It follows that the petitioner and the respondent are no longer husband and wife."

"There the matter begins and ends; that is all with which any court in this country is concerned, and it is no business of the justices, in my opinion, to inquire whether there is lacking the element of adultery, which is a necessary ingredient of divorce in this country. For that reason their decision, in my opinion, is invalid."

3.28. In a case[2] decided in 1957, Hodson, L. J. said:—

> "If it be said that since the parties are not British subjects, the common-law of England does not apply to him, my answer is that such is the law prima facie to be administered in the courts of this country."

3.29. In Tijanic's case,[3] a decree granted to both husband and wife in Yugoslavia was recognised. For the recognition of the decree by English courts, it was immaterial that the ground of divorce was not one on which divorce was obtainable in England. This position was specifically laid down.

The parties in that case were married in Yugoslavia in 1934, both being Yugoslav nationals, and lived together in Yugoslavia until the outbreak of war in 1939. The husband fought in the Yugoslav army, was taken a prisoner of war in Italy, and, after three years in custody, joined the British Army, serving for some two years. In 1949, he came to England and acquired a domicile of choice in that country. In 1954, he applied for and obtained British nationality. On a number of occasions in subsequent years, particularly in 1956, he wrote to his wife inviting her to join him in England. This the wife was unwilling to do. In 1960, she sent him a document ostensibly giving him permission to remarry. Thereafter the husband initiated proceedings in Yugoslavia for the dissolution of his marriage under a provision of Yugoslav law whereby a marriage could be dissolved if the parties had been living apart for a long period and they both consented to the divorce. In October, 1961, a competent court in Yugoslavia pronounced a decree of divorce to both parties. Although the decree recited that it was pronounced in the presence of the litigants, the only persons referred to explicitly as being present were the husband's proxy and his solicitor. On a petition by the husband for, *inter alia*, a declaration that the Yugoslav decree of divorce validly dissolved the marriage, it was held that the reality of

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[1] *Pastre* v. *Pastre*, (1930) *Probate* 80.

[2] *Tikzanako* v. *Tikzanaki* (1957) Probate 301, 306.

[3] *Tijanic* v. *Tijanic*, (1967) 3 All E. R. 976.

the proceedings in Yugoslavia were that the wife joined with the husband in seeking relief and, in so far as she joined in the application and the decree was granted to her, it was granted to a woman who had been for the whole of her life within the jurisdiction of the court concerned and, as the British court would assume jurisdiction in such circumstances, recognition would be accorded to the Yugoslav court's decree ; *it being immaterial that the ground of divorce was not one on which divorce would be granted in England.*

3.30. In *Indyka's* case[1] itself, the foreign divorce granted in Czechoslovakia (which was ultimately recognised), had been granted on the ground of disruption of marital relations, a fact which was, as such, not a ground of divorce in England in 1949 when the District Court of Ostrava (Czechoslovakia), had granted the divorce. In fact, in that very case,[2] Lord Morris observed :

"In this field, there have been some statutory provisions and many judicial decisions. It is too late, in my view, to urge that recognition should be limited to cases where by statute provision is made for it. So also it is, in my opinion, too late to urge that recognition of a foreign decree should in any event and, apart from other considerations, be limited to cases where such decrees have been based on grounds which are grounds for a decree of dissolution in this country. Recognition should, however, always be subject to the proviso that the foreign decree is not vitiated by fraud nor contrary to natural justice (compare *Lepre* v. *Lepre*).[3] In his speech in *Salvesen's case*,[4] Lord Haldane said :[5]

> "Our courts, ... never inquire whether a competent foreign court has exercised its jurisdiction improperly, provided that no substantial injustice according to our notions has been committed.
> "It has followed from the acceptance of domicile as the basis for assuming jurisdiction in England that, if a husband and wife are domiciled in another country and if there is a decree of divorce in that country, it will here be recognised. There has been no insistence that the grounds for a decree in the other country should conform or correspond to those laid down in England." (*See Bater* v. *Bater*).[6]

3.31. *Mather* v. *Mahoney*[7] is an interesting decision—interesting for the variety of territorial contacts exhibited by tht facts. It shows that English courts, when considering the question of recognition, do not pause to inquire into the question how far the foreign decree took into account the laws of other countries having a territorial contact.

In that case, the husband had been born in *Scotland*. He acquired a domicile of choice *in England*. This he retained at all relevant times. In 1961, he married *in Rome* a woman who had lived most of her life in *Pennsylvania*. The parties thereafter lived together (where, it does not clearly emerge), for rather more than three years. In 1964, the wife left her husband and returned to the *United States*.

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[1] *Indyka* v. *Indyka*, (1967) 2 All E. R. 689, 692 (H. L.).
[2] *Indyka* v. *Indyka*, (1967) 2 All E. R. 689, 700 (H. L.) (Lord Morris).
[3] *Lepre* v. *Lepre* (1969) 2 All E. R. 49 ; (1965) Probate 52.
[4] *Salvesen's case*, (1927) All E. R. Rep. 78 ; (1927) A. C. 641.
[5] *Salvesen's case*, (1927) All E. R. Rep. 78, 85 ; (1927) A. C. 641, 651.
[6] *Bater* v. *Bater* (1906) Probate 209.
[7] *Mather* v. *Mahoney*, (1968) 1 W. L. R. 1773.

The following year,—i.e. in 1965—the wife obtained a decree of dissolution of the marriage in *Nevada*, on the ground of mental cruelty. She had gone to the State of Nevada for the express purpose of obtaining this decree. In subsequent *English* proceedings, the husband petitioned for a declaration that the Nevada decree had validly dissolved the marriage, or alternatively, for a decree *nisi* of divorce on the ground of the wife's desertion

Payne J. held that the Nevada decree must be recognised as effective in England: the question of his pronouncing a decree *nisi* did not, therefore, arise. It may be noted that Payne J. did not consider it relevant to discuss the question whether the foreign court had taken into account the English concept of "cruelty". In fact, no reliance was placed on the fact that cruelty was also a ground for divorce in England. That was merely a co-incidence.

Reasons for foreign judgment not relevant.

3.32. According to the English rule, thus, the reasons upon which a foreign court bases its decree are immaterial in regard to recognition of its decree. The grounds of the foreign decree need not be in accord with the grounds for divorce established in English matrimonial law,[1]—provided, of course, the decree does not violate good morals.

English rule—Reason of.

3.33. Thus, English courts,[2] when entertaining divorce or separation proceedings, apply nothing but English law, because the question of the conditions under which the nuptial tie may be loosened or destroyed touches[3] fundamental English conceptions of morality, religion and public policy. There can, therefore be no doubt that where, in exceptional cases, the English court is not the court of the domicile, it is, nevertheless, English law that it applies, and not the law of the foreign domicile.

In *Robinson's case*.[4] Wilmot J. observed:—

> "But if a man originally appeals to the law in England for redress, he must take his redress according to that law to which he appealed for such redress."

Some such reasoning seems to constitute the basis of the principle on which the English Courts act, namely, that it is the English law which is ordinarily to be applied, if relief is sought from an English court in regard to dissolution of a marriage.

V. POSITION IN U.S.A.

American Law.

3.33A. This seems, by and large, to be also the state of the law in the United States.[5] Occasionally, however, United States courts require that the misconduct should be recognised as a cause for divorce by the law of the State where it occurred.[6]

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[1](a) *Harvey* v. *Parnie*; (1880) 5 P. D. 153;
(b) *Pemberton* v. *Hughes*, (1899) 1 Ch. 781;
(c) *Bater* v. *Bater*, (1960) Probate 209;
(d) *Mezger*, v. *Mezger*, (1937), Probate 19, (1963) 3 All E. R. 130.

[2]Wolff, Private International Law (1950), page 373-374.

[3]Cf. para. 3.24, *supra*.

[4]*Robinson* v. *Bland*, (1760) 97 English Reports 717, 721 (King's Bench).

[5]See, e.g., *Torlonia* v. *Torlonia*, 108 Conn., 292, 142A, 848 (1928): and Chestham, Coodrich, Criswold and Reese, Conflict of Laws; Cases and Materials (4th ed. 1957), page 790, cited in (1963) B. Y. B. I. L. page 127-128.

[6]See *Parzel* v. *Parzel*, (1891) 91 Ky. 634, 15 S. W. 658 cited in (1963) B Y. B. I. L. page 127-128.

Application of its own law by courts of the forum in the U.S.A.

3.34. In the USA in regard to *interstate* conflicts, Leflar[1] has stated the position thus:

> "Today, the standard choice-of-law rule calls for a *forum state to apply its own substantive divorce law*, as to what are grounds for divorce, even when the alleged grounds across in other states in connection with spouses at the time domiciled in other states."

Leflar has added that,[2] a state may also, if it chooses to grant divorces for other causes, set up, *as grounds for divorce* in exercising its own jurisdiction, grounds recognised by the law of the place where the particular facts occurred, or where the parties were domiciled when the facts occurred. Conversely, if a State so chooses, it may deny divorces unless the grounds relied upon were grounds for divorce by the law of such other states. This is wholly a matter for each state to decide for itself when it enacts its statute.

For example, in the U.S.A., the Arkansas Statute[3] originally required that, if the grounds for divorce occurred, outside of Arkansas, to parties not the resident in Arkansas, those grounds should be grounds for divorce both by the law of Arkansas and by the law of the place where they occurred.[4] The last part of the requirement was eliminated when Arkansas enacted its "quicker" divorce laws.

3.35. Similarly, a state might limit grounds for divorce to acts occurring at the forum.[5] But, in general, where a court assumes jurisdiction in relation to the grant of divorce, it usually approaches the matter with reference to its own law, i.e., the substantive law of the forum.

VI. OTHER SYSTEMS

Position in some other legal systems.

3.36. Some other legal systems apply, as regards the grounds on which divorce can be granted by their courts, the *lex fori*, or the *lex domicili* which as a rule coincides with the law of the forum.[6] This is the case in Soviet Russia, Estonia, Latavia, Austria, Greece, Denmark, Norway, and in some Latin-American states, such as Chile, Scuador and Urguay.[7]

National law applied in some countries.

3.37. Most of the European and Latin-American laws decide, in principle, in favour of the *national law* of the spouses or the husband; but they modify this by ordaining the application of the *lex fori* where public policy—"ordre public"—is in issue.[8] We shall consider the scope of "ordre public" later.[9]

VII. HAGUE CONVENTION

3.38. Articles 6, 7 and 19 of the Hague Convention may be seen in this connection.

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[1]Leflar, Conflict of Laws (1968), page 547.

[2]Leflar, Conflict of Laws (1968), page 547.

[3]The Ark. Stat. Ann 3505 (C. & M. 1921), cited by Leflar, Conflict of Laws (1968), page 547.

[4]*Mullanband* v. *Mullanband*, (1919) Ark. 505, 208 S. W. 801.

[5]*Nicholas* v. *Maddex* (1900) 52 Le. Ann. 1493, 27 Sc. 966.

[6]Wolff, Private International Law (1950), page 373.

[7]Wolff, Private International Law (1950), page 373.

[8]Wolff, Private International Law (1950), page 373.

[9]Chapter 14, *infra*.

(Chapter 3.—Law applied by Courts. Chapter 4.—Indian Law as to Recognition of Foreign Judgments.)

VIII RATIONALE

Reasons for applying *lex fori*.

3.39. The question may be raised as to the rationale of the English and American practice. In the U.S.A., application of the *lex fori* seems to have been sought to be justified by the merely statutory nature of divorce.[1] The argument is that the effect of statutes is necessarily territorial,—a theory going clearly back to such fathers of territorialism as D'Argentre and Ultricue Huber.

3.40. The view has also been adavanced that divorce remedies are special or equitable, and therefore cannot be exercised except by the courts of the state establishing the remedy. Sometimes, there is invoked the general motivation for territorialism that, the "res" being located within the state, the state's interest prevails. However, most of these theories have had their critics. It is not necessary for our purposes to consider the merits and demerits of these various theories. If parties acquire domicile or nationality in any country, they join the stream of that country. Whatever the proper theoretical basis, there is immense practical convenience in applying the law of the forum; it eliminates the need for research into, and interpretation of, the substantive foreign law.[3]

IX. CONCLUSION

Aspects to be considered.

3.41. In the light of the above discussion, we may now consider the question which we have formulated at the beginning of this Chapter.[3] We should point out that in answering that question, several aspects should be considered.

(a) Juristically, it may be stated that the general rule is that ordinarily a court applies its own law[4]. So, if the foreign court has followed its own law, it has followed the ordinary practice. If we are to require it to depart from the practice, some weighty reasons would appear to be needed.

(b) Sociologically, the parties habitually resident or domiciled in a a court applies its on law[4]. So, if the foreign court has followed its the community where they have taken up their abode, as reflected in the law of divorce of the country concerned. If so, it would be inappropriate to require that the courts of that country should apply the substantive law of some other country as to the grounds of matrimonial relief.

(c) From the practical aspect, a court usually finds it easier to ascertain and apply the law of the forum. We are therefore of the view that the present position needs no change.

CHAPTER 4

INDIAN LAW AS TO RECOGNITION OF FOREIGN JUDGMENTS

I. INTRODUCTORY

Introduction.

4.1. In this Chapter, we shall briefly discuss the Indian law on the subject of recognition of foreign divorces. We have already pointed out[5] that there is

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[1]Rabel, Comparative Conflict of Laws (1958), Vol. 1, page 154.

[2]As to England, see para. 3.23, *supra.*

[3]See para. 3.2, *supra.*

[4]*Cf. Robinson's case,* (1760) 97 English Reports 717 (Para. 3.33, *supra*).

[5]Chapter 1, *supra.*

no specific provision as to recognition of foreign divorces in Indian Statute Law. There are certain general provisions as to the effect of foreign judgments, which we now proceed to consider.

The need for such provisions is obvious. As between different provinces under one sovereignty (e.g. under the Roman Empire), the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any Foreign Court ought to recognise against foreigners who owe no allegiance or obedience to the power which so legislates.

In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a Foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts "of every nation, except (when authorised by special local legislation) in the country of the forum by which it was pronounced."[1]

II. SECTION 13, CODE OF CIVIL PROCEDURE, 1908

Section 13, Code of Civil Procedure, 1908.

4.2. We may first refer to section 13 of the Code of Civil Procedure, 1908. That is a general provision as to the conclusive effect of foreign judgments. This section is operative only when a number of conditions are fulfilled, of which the most important is the condition that the foreign court must be a court of competent jurisdiction. While, therefore, this section does empower Indian courts to recognise foreign judgments and enforce them in certain cases, it postulates that the foreign court must be a competent one, and the question in what circumstances the foreign court is to be regarded as competent, is not answered by the section. The section reads:

> "13. *When foreign judgment not conclusive.*—A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—
>
> (a) where it has not been pronounced by a court of competent jurisdiction :
>
> (b) where it has not been given on the merits of the case;
>
> (c) where it appears on the fact of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
>
> (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
>
> (e) where it has been obtained by fraud;
>
> (f) where it sustains a claim founded on a breach of any law in force in India."

Section 14. Old Code.

4.3. It may be noted that in the Code of Civil Procedure of 1882, the section relating to foreign judgments[2]—section 14—began as follows:—

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[1] *Gurdayal* v. *Raja of Paridkot*, I. L. R. 22 Cal. 222 (P. C.) (Lord Selborne).

[2] Section 14, Code of Civil Procedure, 1882.

"14. No foreign judgment shall operate as a bar to a suit in British India.....".

The negative form of this section in the Code of 1882 made it clear that it was an exception to the general provisions of the section dealing with *res judicata*.[1] But for the provisions of this section relating to foreign judgments, the general bar of *res judicata* might have applied.[2]

Section 13—A comprehensive provision.

4.3A. As one looks at section 13 of the Code of Civil Procedure, 1908, one cannot but be struck by its comprehensive nature and, at the same time, its precision and conciseness. Each of these six exceptions forms an effective tool in the hands of an Indian Court, whereby these courts can legitimately refuse to recognise any foreign judgment.

4.3B. It may be pointed out that common law principles of *res judicata* are also applicable to foreign judgments, as to judgment of our own courts. Section 13[3] of the Code of Civil Procedure, 1908, became necessary in order to qualify the *wider provisions* of section 11 of the same Code, which—but for a specific provision,—might have applied to foreign judgments also.

Competent Court.

4.4. We may now mention a few aspects of section 13. It is well-settled that when present section 13(c)[4] speaks of "international law", and when present section 13(a) speaks of a court of competent jurisdiction, not merely intra-territorial competence, but also the extra-territorial competence[5] -[6] of the foreign court, is predicated.

When conclusive.

4.5. The provision in section 13 of the Code that a foreign judgment is conclusive, is of interest. In *Fuller* v. *Fuller*,[7] Brougham L.C. stated—"whatever irregularities or mistakes might have been committed in the course of the foreign suit", not amounting to fraud, "the Court of Chancery in England had *no jurisdiction as a court of appeal*, to review the decrees of the Court of Chancery in Jamaica, merely because they had proceeded on ignorance of facts or error of law."

These observations show the significance of the word "conclusive". That word also indicates that the judgment is unimpeachable,—unless, of course, one of the specified vitiating circumstances exists.

Effect on third parties.

4.6. In a Madras case,[8] Holloway J., and in a Calcutta case,[9] Sir Barnes Peacock C.J. elaborately reviewed the law regarding judgments in divorce cases and how far they were admissible in evidence. Sir Barnes Peacock C.J. observed:

> ".....the effect of a decree in a suit for a divorce a *vinculo matrimoni* is to cause the relationship of husband and wife to cease. It is *conclusive* upon all persons that the parties are no longer husband and wife; but it is not conclusive or even prima facie evidence against strangers that the cause for which the decree was pronounced existed. For instance, if a

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[1]Section 11 of the present Code; section 13 of the Code of 1882.

[2]Para. 4.4, *infra*.

[3]Section 13, Code of Civil Procedure, 1908.

[4]Para. 4.2, *supra*.

[5-5]*Mohan Lal* v. *Prem Suck*, A. I. R. 1956 Nagpur 273.

[6-6]*Abdul Wazid* v. *Vishwanathan*, A. I. R. 1953 Madras 261.

[7]*Fuller* v. *Fullers* (1831) 1 Myl. & K. 297, 39 E. R. 693.

[8]*Yarkalamma Nagamma* v. *A. Naremma*, (1864-65) 2 M. H. C. R. 276.

[9]*Kanhya Lal* v. *Radha Churn*, (1867) 7 WR, 338, 344; Meng. L. J. Sup. Vol. 662 (P. B.).

decree between A and B were granted upon the ground of adultery of B with C, it would be conclusive as to the divorce, but it would not be even prima facie evidence against C that he was guilty of adultery with B, unless he were a party to the suit."

Bar to suit.

4.7. A foreign judgment, when conclusive under section 13 of the Code of Civil Procedure, 1908, may be pleaded as a defence as a bar to a suit in India,[1] provided it is given on the merits[2] as prescribed by section 13.

Natural justice.

4.8. It may be noted that section 13(d) of the Code of Civil Procedure, 1908, also provides that a foreign judgment is not conclusive when the proceedings in which the judgment was obtained are opposed to natural justice. In that section, the expression "natural justice" refers to the form of procedure, and not to the merits.[3] Failure to appoint a guardian for a minor may render the foreign judgment unenforceable under this section.[4]

Effect of the word "except."

4.9. It is not very clear what is the effect of a foreign judgment where the judgment is vitiated by one or more of the factors mentioned in clauses (a) to (f) of section 13. The judgment is certainly not conclusive,—as section 13 itself enacts. But does it retail any relevance at all ? This much is clear—that section 13 will not apply where the vitiating circumstances exist, and the judgment would not be conclusive. But what would be the position regarding relevance where a vitiating factor exists ? It would seem, on principle, that the judgment should be disregarded totally.

The word "except" in the section is important in this context. As regards the meaning of the word "unless",—an analogous word—Lord Esher, M.R., pointed out in the *Carl XV*[5]:

> "When you have the word 'unless' in the English language, it carries with it that, if something happens, then what has been said before will not apply."

Indian law as to recognition of judgments contrary to international law.

4.10. A foreign judgment contrary to the principles of international law may be impeached in India.[6] This general provision is also recognised by section 13(c) of the Code of Civil Procedure, 1908.

Other provisions of the Code.

4.11. It may be noted that while section 13 of the Code is relevant for the purpose of recognition of foreign judgments in general, it does not deal with enforceability. One has to file a suit on a foreign judgment in order to obtain a decree which can be executed.

The Code of Civil Procedure also contains certain provisions[7] *as to the direct enforcement* of certain foreign judgments. But these provisions are not material as regards divorces, for the reason that a judgment of divorce, or a judgment granting legal separation, does not, in general need "enforcement".

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[1] *Chockalingam* v. *Duraiswami*, A.I.R. 1928 Mad. 327, 336.

[2] *Sonia Singh* v. *Balla Singh*, (1919) Punj. Record No. 14, page 30.

[3] *Rama Shenoi* v. *Hallagana*, (1918) I.L.R. 41 Mad. 205.

[4] *Govindan* v. *Laxmi Bharathi*, A.I.R. 1964 Ker. 244, 248, para. 22.

[5] *The Carl XV* (1892) Probate 324 ; 68 Law Times Reports 149.

[6] (a) *Nallatambi* v. *Ponnuswami*, I.L.R. 2 Mad. 400.
(b) *Hinde* v. *Ponnah*, I.L.R. 4 Mad. 359.
(c) *Bikrame* v. *Bir*, (1888) P. R. 191.
(d) *Christian* v. *Delanney*, (1900) 3 C. W. N. 614.

[7] Sections 44 and 44A, Code of Civil Procedure, 1908.

Ex parte judgment.

4.12. Even a decree which is pronounced in ***absentem*** by a foreign court is ***valid and executable*** in the country of the forum by which it was pronounced, when authorised by special local legislation.[1] A decree passed by a foreign court, to whose jurisdiction a judgment-debtor had not submitted, is an absolute nullity, only if the local legislature had not conferred jurisdiction on the domestic courts over the foreigners either generally or under specified circumstances. Section 20(c) of the Code of Civil Procedure, 1908, confers jurisdiction on a court in India over foreigners, if the cause of action arises within the jurisdiction of that court. Hence a decree passed against a foreigner in such circumstances is not an absolute nullity.[2] It may be more appropriate to say that the decree in question is not executable in courts outside this country.

III. EVIDENCE ACT

Section 41, Evidence Act.

4.13. So much as regards the provisions in the Code of Civil Procedure. We may next refer to section 41 of the Indian Evidence Act, 1872, which reads—

> "41. *Relevancy of certain judgments in probate, etc., jurisdiction.*—A final judgment, order or decree of a competent court, in the exercise of probate, *matrimonial*, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.
>
> "Such judgment, order or decree is *conclusive proof*—
>
> that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;
>
> that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment order or decree declares it to have accrued to that person;
>
> that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;
>
> and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property."

Court under section 41, Evidence Act, must be a *competent one.*

4.14. It may be noted that, like section 13 of the Code of Civil Procedure, section 41 of the Evidence Act[3] also postulates that the court which pronounces the judgment must be a *competent* one. Its applicability, therefore, depends on the determination of the question of competence of the Court, and, where the court concerned is a foreign court, the determination of the question necessarily takes us to a consideration of the law relating to recognition, because the foreign court must be competent in the extra-territorial sense also. This has been well established by a series of judicial decisions.[4] In other words, the foreign court must have exercised jurisdiction on the basis of a criterion recognised by Indian law.

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[1] *Lalji Raja* v. *Hansraj Vathuram*, A.I.R. 1971 S.C. 974, 977.

[2] *Lalji Raja* v. *Hansraj Vathuram*, A.I.R. 1971 S.C. 974, 977.

[3] Para. 4.13, *supra*.

[4] Para. 4.15, *infra*.

Section 41—Interpretation of.

4.15. A few propositions emerging from judicial decisions on section 41, Evidence Act, may be set out at this stage for convenience—

(a) It is well settled that, in section 41, the expression "competent court" means the court of *any country*, if the court is *otherwise competent* to pass such judgment as is referred to in the section.

A number of cases have held[1] that judgments of foreign courts are not excluded from the scope of section 41. In a Bombay case[2], this proposition was accepted as correct by Beaumont C.J. and B.J. Wadia J., although the particular judgment in issue in that case was held to be outside section 41.

(b) It is also not disputed that a judgment of a matrimonial court, decreeing divorce, is, by virtue of section 41, binding as to the status of the parties concerned, on the whole world, provided the other conditions mentioned in section 41 are satisfied[3].

(c) The judgment is conclusive only regards status but not as regards the grounds on which it is based[4].

(d) If a judgment is regarded as falling within section 41, then, that section dispenses with the proof of the legal character conferred or declared by the judgment[5].

IV. MATRIMONIAL LEGISLATION

Enactments relating to matrimonial jurisdiction.

4.16. So far, we have dealt with the general provisions of Indian statute applicable to foreign judgments. What, then, are the rules of recognition specifically applicable to judgments of divorce? We first search for such rules in the enactments relating to matrimonial causes. In India, matrimonial jurisdiction is exercised by the courts under a number of enactments, and the enactment applicable depends, in most cases, on the religion of the parties. The principal enactments in chronological order, are the following:—

(a) The Converts' Marriage Dissolution Act, 1866 (21 of 1866), under which dissolution of a marriage can be obtained by a convert to Christianity, if his or her spouse refuses to be converted to that religion.

(b) The Parsi Marriage and Divorce Act, 1936 (3 of 1936), relating to divorce among the Parsis.

(c) The Dissolution of Muslim Marriages Act, 1939, which is confined to divorce at the instance of the petitioning Muslim wife on certain specified grounds:

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[1](a) A.I.R. 1950 Mysore 57, Para. 4.

(b) A.I.R. 1959 Raj. 149, 152.

(c) A.I.R. 1959 Mad. 410, 421.

[2]*Messa* v. *Messa*, (1938) 40 Bombay Law Reporter 871, A.I.R. 1938 Bom. 394, 396, 397, (Beaumont C. J. and B. J. Wadia, J.) approving Chandavarkar J.'s view in Chanamallappa, (1911) I.L.R. 35 Bom. 139.

[3]*Ma Po Khin* v. *Ma Shin*, (1933) I.L.R. 11 Rangoon 19.

[4]*D. G. Sahasrabudhe* v. *Kinchand Devchand & Co., I.L.R.* (1947) Nagpur 85.

[5]*Vishwanath* v. *Abdul Walid*, A.I.R. 1963 S. C. 1.

(d) The Special Marriage Act, 1954, which, on a proper view, is applicable only to persons marrying under that Act.

(e) The Hindu Marriage Act, 1955 (39 of 1955), which is applicable to Hindus;

(f) The Foreign Marriage Act, 1969[1].

Foreign Marriage Act, 1969.

4.17. We need not reproduce here the provisions of these Acts. We shall, however, briefly discuss the Foreign Marriage Act, 1969, which is of special interest. The Act makes provisions in respect of marriages of citizens of India while they are abroad. The term "foreign marriage" is not expressly defined, but section 4 of the Act would imply that term refers to a marriage between parties, one of whom at least is a citizen of India, by or before a marriage officer in a foreign country.

By the Act, the Central Government is authorised to appoint any of its diplomatic or consular officers to be a marriage officer for any foreign country. According to section 5 notice of intention to marry has to be given to the marriage officer, and there are certain requirements as to residence before the marriage can be solemnised.

The Act provides that matrimonial reliefs in respect of foreign marriages would be governed by the provisions of the special Marriage Act, 1954,—with certain modifications, not material for our purpose.

The Central Government is also empowered, by section 23, to declare that *marriages* solemnised "under the law in force in any foreign country" *shall be recognised* by courts in India as valid if the Central Government is satisfied that the foreign law contains provisions similar to the Foreign Marriage Act. There is no provision as to the recognition of foreign divorce.

This Act, in short, while necessarily dealing with marriages having a foreign element, does not tell us anything about recognition of *foreign divorces*.

Other marriage laws.

4.18. The various enactments relating to the marriages of persons belonging to various communities are[2] also silent on the subject of *recognition of foreign divorces* as such, and do not contain a direct provision for the recognition of foreign judgments of divorce or judicial separation[3].

Therefore, it becomes necessary to consider the judicial decisions on the subject, in order to ascertain the legal position.

V. RULES APPLIED BY COURTS

English law followed.

4.19. Indian case-law on the specific question of recognition of foreign divorces is not so abundant as in England, but a perusal thereof shows that English rules are generally followed in this field. An examination of the case law indicates that it would be correct to say that, in general, Indian courts will, in matters pertaining to the field of conflict of laws, follow the view taken by English courts at common law. It may also be noted that the judgment of the Supreme Court in *Satya* v. *Teja Singh*[4], to which we have already referred[5], contains an extensive discussion of the English law, besides various other materials.

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[1]See para. 4.17, *infra*.
[2]Para. 4.16, *supra*.
[3]Also see Chapters 5-6, *infra*.
[4]*Satya* v. *Teja Singh*, A.I.R. 1975 S. C. 105.
[5]Chapter 1, *supra*.

Most of the judicial decisions give primary importance to domicile in matters of status.

A case of divorce.

4.20. In *Noorjehan Begum v. Eugene Tiscence*[1], a Russian woman, after leaving her Russian husband in Europe, arrived in India, embraced Islam, and, on the husband's refusal to get converted to Islam, sought, under section 42 of the Specific Relief Act (1 of 1877) (the Act then in force), a declaration from the High Court to the effect that her marriage had been dissolved in accordance with her personal law. She relied, for this purpose, on a rule of Mohammedan Law under which a convert to Islam is entitled to a dissolution of his or her marriage, if on an offer by him or her, the other spouse refuses to become a Muslim. The Court held that it had no jurisdiction to declare a marriage between parties *not domiciled in India* to be dissolved, and further characterised the rule of Muslim law as being neither the general law of India nor in accordance with the rules of private international law. This decision shows[2] that jurisdiction to divorce is not, in general, assumed by Indian Courts in the absence of domicile.

Domicile material in other cases.

4.21. Even in proceedings other than for divorce, domicile may be material.

In regard to adoption, reference may be made to the decision of the Bombay High Court in *Vasant v. Dattoba*[3], and that of the Privy Council in *Nataraja v. Subbarayn*[4]. In both these cases, the judgments of that foreign courts relating to the declaration that the claimant in each case had been validly *adopted* according to the law *law of domicile* of the widow making the adoption.

In the Privy Council case, it was held that the judgment of the Court at Pondicherry, recognising the validity of the adoption as having been duly made in accordance with the law of domicile of the widow, was "to be weighty in all the matters with which it dealt" in the suit at Madras. As the appellants were not parties to the suit at Pondicherry, there was no question of *res judicata*. In the circumstances of the case, their Lordships were of the opinion that "the French judgment has to be regarded as strong and uncontradicted evidence". Apparently, this conclusion was reached with reference to section 13 of the Evidence Act, under which a "transaction or instance" by which a right is exercised or asserted etc. is relevant.

Inter-state conflict of law in India and relevance of domicile.

4.22. The question of domicile is sometimes raised in India in regard to inter-state conflict of laws also. Thus, in *Lachminarain v. Fateh Bahadur*[5], the question arose whether a person belonging to the Oudh Province, who was disqualified from contracting by being declared a 'disqualified proprietor' under the provisions of the Oudh Land Revenue Act (17 of 1876) could validly alienate property in the North Western Province, within the jurisdiction of the Allahabad High Court.

Applying the principles of private international law and after discussing views of Dicey, Story and other writers, the High Court of Allahabad held that the incapacity under the *'lex domicilii'* extended to contracts entered into by the

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[1]*Noorjehan Begum v. Eugena Tiscence*, I.L.R. (1942) 2 Cal. 185.

[2]As to jurisdiction under Indian matrimonial legislation ; see chapters *5-6, infra.*

[3]*Vansant v. Dattaba*, A.I.R. 1956 Bom. 49.

[4]*Nataraj v. Subbaryn*, A.I.R. 1950 P. C. 34. 36 Para. 11 (appeal from A.I.R. 1939 Mad. 693) (Section 13, Evidence Act).

[5]*Lachminarain v. Fateh Bahadur*, (1902) I.L.R. 25 All. 195.

person concerned, even though the contract there relating to property outside the province of Oudh. Again, in the Bombay case of *Shankar Vishnu* v. *Maneklal Haridas*[1], a debt incurred in Bombay was held not to be discharged under proceedings which took place in accordance with the Central Provinces Debt Conciliation Act, 1933, as the Bombay law was the proper law of the contract, and hence a discharge was not possible by a method not recognised by the proper law.

To quote the observations of Beaumont, C.J. in *Shankar Vishnu's case*. "No doubt, the Provinces of Bombay and the Central Provinces are both parts of British India, but in my opinion, where the law of one province of British India is distinct from the law of another province, the two provinces must be regarded for the purposes of this rule (of proper law) as *foreign countries inter se*".

Cases where Domicile is not material.

4.23. There may be, on the other hand, situations where domicile is not material. Reference may, in this connection, be made to the judgment of Venkatasubba Rao J. in *Ratansi Moraji* v. *Administrator General of Madras*[2]. A European lady[3] became converted to the Hindu faith, married the petitioner, a Hindu, according to Vedic rites, and, when she died, was cremated according to Hindu custom. She had left an unattested will, and the question arose in the probate proceedings, whether the testatrix was a 'Hindu',—in which case alone, the unattested will would have been valid. (Before 1927, the will of a Hindu executed in a mofussil place was valid, even if it was unattested). The Court, answering the question in the affirmative, held that a European who becomes a Hindu, becomes also subject to the Hindu law, the test in such a case being not of domicile, but of religion.

In *Ratanshaw* v. *Bamanji*[4], the plaintiff claimed land on the basis of a gift-deed from the second of a Parsi, who had died domiciled in Baroda. The first marriage of the Parsi was dissolved by 'fargat' or 'mutual release', in accordance with a lawful custom prevalent among *Parsis domiciled in Baroda*. Such a divorce was not, however, recognised by the personal law of Parsis in *British India*. The court held, that for the *purposes of succession* to land in India, the validity of the divorce should be tested by Indian law. Of course, this decision is not directly concerned with the recognition of divorces. Indian law was applied because the land in issue was situated in India. The principle applied[5] was that the "*lex loci rei sitai governs* exclusively the tenure, title and descent of immovable property."

Domicile in one State.

4.24. The much discussed case of *Kamlabai* v. *Devaram*[6] was a Bombay one. The Bombay Hindu Divorce Act, 1947 (Bombay Act 22 of 1947), allowed divorce among Hindus on certain grounds, but there was no similar Act in the State of Madhya Pradesh. A husband, resident of Madhya Pradesh, had deserted his wife, who thereupon settled in Bombay with her father. The wife sued for divorce under the Bombay Act. It was not applicable to her case, as her husband and hence she herself was 'domiciled' in Madhya Pradesh. We are not concerned with the knotty problem whether there can be domicile in a State as much. But this case shows that the concept of domicile is material.

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[1]*Shankar Vishnu* v. *Maneklal Haridas*, A.I.R. 1940 Bom. 362.

[2]*Ratansi Morarji* v. *Adm. Gen. of Madras*, (1938) 55 M. L. J. 478 (Venkatasubba Rao J.).

[3]For a discussion of the cases, see T. S. Rama Rao in (1955) 4 Ind. Year Book of International Affairs, 219, 232.

[4]*Ratanshaw* v. *Bamanji*, A.I.R. 1938 Bom. 238, 240, 241 (N. J. Wadia J.).

[5]*Fenton* v. *Wingston*, (1859) 115 R. R. 1062.

[6]*Kamlabai* v. *Devaram*, A.I.R. 1955 Bom. 300.

(Chapter 4.—Indian Law as to Recognition of Foreign Judgments. Chapter 5.—Indian Law as to Jurisdiction under enactment other than the Indian Divorce Act.)

Relevance of English law.

4.25. The above resume of selected Indian judicial decisions in the field of divorce and in other fields of family law shows that English rules in these fields have been generally followed in India, so far as conflict of laws is concerned. It therefore, becomes material to examine the English common law on the subject, and it is premissible to proceed on the assumption that in general, though not necessarily in every detail, the English common law would, in the absence of specific statutory provisions enacted in India on the subject, be followed by Indian courts.

CHAPTER 5

INDIAN LAW AS TO JURISDICTION UNDER ENACTMENT OTHER THAN INDIAN DIVORCE ACT

I. INTRODUCTORY

Introductory.

5.1. We shall now refer briefly to the provisions as to jurisdiction to dissolve marriages, as contained in some of the enactments[1] relating to matrimonial jurisdiction in India.

II. PARSI MARRIAGE ACT

Parsi Marriage Act.

5.2. Of these enactments, the Convert's Marriage Dissolution Act, 1866 is not of much practical importance. The Indian Divorce Act, 1869, requires fuller discussion and we shall deal with it later[2].

The Parsi Marriage Act, 1936, which is chronologically the first of the remaining enactments, provides as follows[3] on the question of jurisdiction of courts, in section 29—

> "29.(1) All suits instituted under this Act shall be brought in the court within the limits of whose jurisdiction the defendant resides at the time of the institution of the suit.
>
> (2) When the defendant shall at such time have left India such suit shall be brought in the Court at the place where the plaintiff and defendant last resided together.
>
> (3) In any case, whether the defendant resides in the territories to which the Act extends or not, such suit may be brought in the Court at the place where the plaintiff and the defendant last resided together, if such court, after recording its reasons in writing, grants leave so to do."

Uncertainty as to scope of section 29

5.3. Section 29 of the Parsi Marriage Act, quoted above[4], brings in the foreign element only in sub-sections (2) and (3); and, even in those sub-sections, it is not clear whether the sub-sections are intended to regulate, as a *matter of private international law*, the jurisdicion of Indian courts. In this respect, the provision in the Special Marriage Act is more specific[5].

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[1]See para. 4.10, *supra*, for a list of the enactments.

[2]See Chapter 6, *infra*.

[3]Section 29, Parsi Marriage Act, 1936

[4]Para. 5.2, *supra*.

[5]Section 31, Special Marriage Act, see para. 5.4, *infra*.

III. SPECIAL MARRIAGE ACT

Special Marriage Act.

5.4. Under the Special Marriage Act,[1]—

> "31. (1) Every petition under Chapter V or Chapter VI shall be presented to the district court within the local limits of whose jurisdiction the marriage was solemnized or husband and wife reside or last resided together.
>
> (2) Without prejudice to any jurisdiction exercisable by the court under sub-section (1), the district court may, by virtue of this sub-section, entertain a petition by a *wife domiciled in the territories to which this Act extends* for nullity of marriage or for divorce if she is resident in the said territories and has been ordinarily resident therein for a period of three years immediately preceding the presentation of the petition and *the husband is not resident in the said territories.*"

Scope of section 31.

5.5. It may be noted that the section 31 of the Special Marriage Act, quoted above,[2] is specific in one respect, inasmuch as sub-section (2) of that section seems to contemplate a case involving a foreign element. It emphasises the aspect not of internal venue, but of jurisdiction with reference to *private international law*. This is apparent from the reference to a *wife domiciled in the territories to which the Act extends*, and from the requirement that she should be resident "in the said territories". These words do not insert any requirement that the wife should be resident in the *district* or local limits of the district court. Rather, they focus attention on the territories *as a whole*. In this sense, they seem to contemplate a case having a foreign element.

Neelakantan's case.

5.6. With reference to this Act, the question of private international law was considered in *Neelakantan's case*[3]. The question which emerged for determination, was thus formulated in the judgment—

> "Whether an application for divorce by a *husband domiciled in India*[4] and living within the jurisdiction of the District Judge, Jodhpur, can be made in the Jodhpur Court under the principles of Private International Law, although admittedly the marriage between the parties was not solemnized within the jurisdiction of the said court, nor did the husband and wife reside at the time of the marriage or thereafter within the jurisdiction of that court as required by section 31 of the Special Marriage Act ?"

It was held that the Jodhpur Court had jurisdiction, on principles of private international law, though section 31 of the Act did not, on the facts, apply. In doing so, the Court pointed out that the husband was domiciled in India.

It is not necessary, for the present purpose, to examine the validity of the conclusion reached in this case to the effect that a *marriage not solemnized under the Special Marriage Act* can be dissolved thereunder. Nor is it necessary for us to express any view on the observations as to private international law. We are referring to this case merely to show the emphasis placed in the judgment on the husband's domicile in the judgment.

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[1]Section 31, Special Marriage Act, 1954.

[2]Para. 5.4, *supra*.

[3]*Neelakantan* v. *Neelakantan*, A.I.R. 1959 Raj. 133.

[4]Emphasis added.

IV. HINDU MARRIAGE ACT

Hindu Marriage Act—Section 1 (2) and Section 19.

5.7. In the Hindu Marriage Act, 1955, there are two provisions which should be noted.[1] Section 1(2) of the Act provides as follows:—

> "(2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories".

Next, we may refer to the provision relating to jurisdiction in the Hindu Marriage Act, which reads as follows:—

> "19. Every petition under this Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized or the husband and wife reside or last resided together".

Case law on Hindu Marriage Act.

5.8. Decided cases on section 19 of the Hindu Marriage Act illustrate the application of the section. Thus, it has been pointed out[2] that a plain reading of section 19 shows that it gives a choice either to the husband or to the wife to institute proceedings at three places,—namely, where the marriage was solemnized, or where the husband and the wife both reside at the time of presentation of the petition, or where both of them last resided together. Hence, where the marriage was solemnized at Delhi and the parties last resided for a short period at Chandigarh, the Court at Chandigarh would have jurisdiction. The phrase "last resided together" is not to be interpreted in a pedantic manner, and must be construed liberally and the Chandigarh Court will have jurisdiction apart from the Delhi Court. Of course, casual residence would not suffice.

It has also been held[3] by the Madras High Court that reading sections 19 and 21 of the Hindu Marriage Act, 1955, and section 3 and 20 of the Code of Civil Procedure, 1908, together, the Court will be justified in holding that the provisions of the Code of Civil Procedure are also applicable to applications under the Hindu Marriage Act, and the Court within whose jurisdiction the *defendant is residing* will, by virtue of section 20 of the Code, have jurisdiction, where the tests laid down in section 19 of the Act are not satisfied on the facts.

Provision ambiguous.

5.9. Section 19 of the Hindu Marriage Act[4] does not, however, very clearly indicate whether it is intended to apply also to cases *involving a foreign element*. In other words, it is not beyond doubt whether the section deals with jurisdiction amongst Indian Courts *inter se*, or whether it is also intended to incorporate a rule of conflict of laws in regard to jurisdiction.

There is, no doubt, the general provision[5] as to application of the Act to Hindus[6] domiciled in India who are outside India—section 1(2). It could be argued that section 1(2) impliedly brings in the criterion of domicile, in regard to the exercise of jurisdiction by Indian Courts in general. But the matter is not entirely beyond doubt. For our present purpose, it is not necessary to express an opinion on the point.

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[1] Section 1(2), and section 19, Hindu Marriage Act, 1955.

[2] *Sushma* v. *A. K. Dewan*, A.I.R. 1973 P. & H. 256, 257, Para. 6 (M. R: Sharma, J.).

[3] *M. Gomathi* v. *S. Natarajan*, A.I.R. 1973 Mad. 247.

[4] Section 1(2), Hindu Marriage Act, 1955.

[5] Section 1(2), Hindu Marriage Act, 1955.

[6] Para. 5.7, *supra*.

CHAPTER 6

JURISDICTION UNDER INDIAN DIVORCE ACT, 1869

I. INTRODUCTORY

Introductory.

6.1. We shall briefly deal, in this Chapter, with the provisions of the Indian Divorce Act, 1869, relating to the jurisdiction of courts thereunder in regard to divorce. The Act applies only to Christians; but the provisions are not confined to marriages solemnized in India, and are wide enough to empower Indian Courts to dissolve a marriage solemnized outside India, if certain conditions exist.

II. POSITION BEFORE 1926

Section 2, Divorce Act.

6.2. The principal provision of the Act, relating to the conditions to be satisfied for the exercise of jurisdiction, is in section 2. Before the amendment of the section in 1926, there was no restriction under the Act that the parties should be domiciled in (British) India, in order that the court may grant a divorce. Residence in British India was enough. After its amendment, the section does insert such a requirement. We shall deal with section 2 in detail, later.[1]

Section 45, Divorce Act.

6.3. Section 20 of the Code of Civil Procedure, 1908, which is the general provision as to venue in personal actions, brings in the test of either residence on the part of the defendant or the accrual of the cause of action or part of it within the jurisdiction of the Court, in order to enable the Court to entertain the suit. However, section 45 of the Indian Divorce Act, which makes the Code of Civil Procedure applicable, expressly makes it 'subject to the provisions herein contained'. We need not, therefore, discuss the provisions of the Code of Civil Procedure as to jurisdiction.

Thus, in determining questions as to the jurisdiction of the Court to entertain a matrimonial suit, no reference can be made to section 20 of the Code of Civil Procedure, 1908, even if that section can be construed as dealing with proceedings having a foreign element. Jurisdiction to entertain a matrimonial suit between Christians, is to be decided solely by a reference to sections 2 to 4 of the Indian Divorce Act. This position seems to have been accepted for a long time.

Provision in Indian Divorce Act, 1869 before amendment of 1926.

6.4. Section 2 of the Indian Divorce Act (before its amendment in 1926), so far as is material, was in these terms:

> "2. Nothing hereinafter contained shall authorise any Court to grant any relief except in cases where the petitioner professes the Christian religion, *and resides in India at the time of presenting the petition*.....
>
> or to make decree for *dissolution of marriage except in the following cases:*
>
> (a) where the marriage shall have been solemnized in India, or
>
> (b) the adultery complained of shall have been committed in India."

Previous cases.

6.5. Some of the cases on this section decided before 1926 laid down that residence was enough under the Act to confer jurisdiction on the court to try suits for dissolution of marriage.[2]

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[1] See paras. 6.4 and 6.11, *infra*.

[2] (a) *Giordano* v. *Giordano*, (1912) I.L.R. 40 Cal. 215;
(b) *Warwick* v. *Warwick*, 64 P. R. 1900;

(Divorce Act. Chapter 6.—Jurisdiction under Indian Divorce Act, 1869.)

Test of domicile.

6.6. Before the amendment[1] of 1926, thus, the view taken by Courts in India was that they could dissolve the marriage of spouses who were not domiciled in India. The result was, that the dissolution of a marriage by Indian Courts, of parties not domiciled in India, was valid so far as Indian statutory framework was concerned, but it had no effect on the status of the parties in the country of their domicile.

This gave rise to a deplorable state of affairs, and to "scandals" of the nature mentioned by their Lordships of the Privy Council in the concluding sentence of their judgment in *Le Mesurier* v. *Le Mesurier*[2]: "the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another .....".

Keyes v. *Keyes*, and its criticism.

6.7. The question of recognising such a divorce, granted in India, arose in England. Sir Henry Duke, president of the Probate Division, decided in *Keyes* v. *Keyes*,[3] that the Courts administering the divorce law in India had no jurisdiction to decree dissolution of a marriage where the parties were not domiciled in India. He also decided that the Indian Councils Act, 1861, did not warrant the making of a law by the Indian Legislature to empower Courts in India to decree dissolution of the marriage of persons not domiciled within their jurisdiction.

That decision was discussed in several reported cases in India[4-5]. It was pointed out that it would have been enough for the Court in *Keyes* v. *Keyes* to say that since *Le Mesurier's case*[2] or, at any rate, since *Bater* v. *Bater*,[6] the jurisdiction to decree dissolution of marriage depends, according to English law, upon the domicile of the parties, and that as the domicile of the parties in *Keyes* v. *Keyes* was English, English Courts would not recognise, *as valid in England*, a decree pronounced by a Court in India whose jurisdiction was based on a principle—that of the residence of the parties at the time—which according to English law was not accepted as conferring jurisdiction.

In fact, in an early part of the judgment, the President said: "The petitioner has brought this suit to determine the *validity at any rate* in England, of the decree made at his instance in India." It was, therefore, the *extra-territorial validity* of the Indian decree that was primarily in question in the suit. It was not necessary to go further to the extent of enquiring whether the power conferred by the Indian Councils Act, 1861, had been exceeded in enacting the Indian Divorce Act, 1869.

However, the decision in *Keyes* v. *Keyes* had the effect of rendering vulnerable, in England, the validity of many divorces granted by Indian Courts between parties who were resident, though not domiciled, in (British) India. This position was dealt with later by legislation, to which we shall refer in due course[7]. That legislation changed the basis of jurisdiction by substituting domicile for residence. As to the past, validating legislation was also enacted[8].

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[1] *Vide* amending Act 25 of 1926.

[2] *Le Mesurier* v. *Le Mesurier*, (1895) A. C. 517 (P. C.).

[3] *Keyes* v. *Keyes*, (1921) Probate 204.

[4] *Wilkinson* v. *Wilkinson*, A.I.R. 1923 Bom. 321.

[5] *Lee* v. *Lee*, A.I.R. 1924 Lah. 513.

[6] *Bater* v. *Bater*, (1906) Probate 209.

[7] Para. 6.9, *infra*.

[8] Para. 6.12, *infra*.

6.8. After the decision in *Keyes* v. *Keyes*,[1-2] there were three courses open to the High Courts in India— Courses open to High Courts after *Keyes* v. *Keyes*.

(a) to follow the decision in *Keyes* v. *Keyes* that the *Indian Legislature had no power* to give the Courts jurisdiction to grant decrees for dissolution of marriage to non-domiciled parties ; or

(b) to hold that the Indian Legislature had the power, but had not exercised it ; or

(c) to hold that the Indian Legislature had the power, and had exercised it.

For some time, uncertainty and conflict prevailed as to which of these courses should be adopted. The position was clarified by the Indian Legislature, by amending section 2 of the Act.[3]

III. POSITION AFTER 1926

6.9. Section 2 of the Indian Divorce Act, 1869[4] was amended by Act 25 of 1926 and Act 30 of 1927. The effect of the amending Act of 1926, broadly stated, has been to limit the power of the Indian Courts, in respect of granting decrees for dissolution of marriage under the Act, *to persons who are domiciled in India.* Amendments of 1926 and 1927.

6.10. Now, the jurisdiction of the Indian Courts (under the Indian Divorce Act), in the matter of dissolving marriages, is expressly limited by section 2 to persons domiciled in India at the time of presentation of the petition. Therefore, if the domicile of the parties is not Indian, there can be no dissolution by the Courts[5] in India. Domicile sole test.

6.11. Present section 2 of the Divorce Act reads— Present section 2.

"2. This Act extends to the whole of India except the State of Jammu and Kashmir.

Nothing hereinafter contained shall authorise any Court to grant any relief under this Act, except where *the petitioner or respondent* professes the Christian religion,

or to make decrees of dissolution of marriage *except where the parties to the marriage are domiciled in India at the time when the petition is presented.*

or to make decrees of nullity of marriage except where the marriage has been solemnised in India, and the petitioner is resident in India at the time of presenting the petition,

or to grant any relief under this Act, other than a decree of dissolution of marriage or of nullity of marriage, except where the petitioner resides in India at the time of presenting the petition."

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[1]*Keyes* v. *Keyes*, (1921) Probate 204.
[2]Para. 6.7, *supra*.
[3]Para. 6.9, *infra*.
[4]Para. 6.4, *supra*.
[5](a) *Wilson* v. *Wilson*, A.I.R. 1931 Lah. 245 ; (Nullity) ;
(b) *Pyatt* v. *Pyatt*, A.I.R. 1929 Lah. 565(1);
(c) *Hall* v. *Hall*, A.I.R. 1933 Sind 70;
(d) *Waller* v. *Waller*, I.L.R. 10 Lah. 64 ; A.I.R. 1928 Lah. 557 ;
(e) *Grant* v. *Grant*, A.I.R. 1937 Pat. 82.

U. K. Acts from 1926 to 1947.

6.12. Certain statutes of the U.K. Parliament relevant to the above discussion may also be noted. The divorces granted in the past were validated in 1921 by an Act of Parliament.[1] Under the Indian and Colonial Divorce Jurisdiction Act, 1926,[2] as amended by the Government of India (Adaptation of Acts of Parliament) Order, 1937, and the Indian and Colonial Divorce Jurisdiction Act, 1940,[3] a High Court in British India, was given jurisdiction to make a decree for a dissolution of a marriage, and other incidental reliefs in certain cases not covered by amended section 2 of the Indian Divorce Act of 1869. The law to be applied by the High Court was the English law.

Section 17 of the Indian Independence Act, 1947,[4] provided that no Court in the newly created Dominion of India should have jurisdiction under the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, in or in relation to any proceedings for a decree for dissolution of a marriage (except for pending proceedings, but all Courts in India should have the same jurisdiction under the said Acts, as they would have had if the Act had not been passed, subject to any further amendment of the law, either by an Act of British Parliament or by India.

The U.K. Statutes are, therefore, of no practical importance now. But they have been referred to here as illustrating the proposition that in the absence of special statutory provisions, domicile came to be accepted as the only criterion for exercising jurisdiction under the Indian Divorce Act, 1869.

IV. MEANING OF 'DOMICILE' UNDER THE DIVORCE ACT

Domicile as on date of petition.

6.13. Thus, domicile is the exclusive head of jurisdiction under the Indian Divorce Act, 1869 for dissolving a marriage. It has been held[5] that for the purposes of the Act, the domicile must be decided as on the date of the petition for dissolution.

Jurisdiction in nullity.

6.14. Jurisdiction in regard to nullity is wider under the Act. In the case of *Wilson* v. *Wilson*[6], jurisdiction was exercised in regard to a petition for nullity even though the petitioner was not domiciled in India, because the marriage was solemnized in India, and the petitioner was resident in India at the time of the petition. This is permitted by section 2 of the Divorce Act.

On the other hand, it was held in *Pyatt* v. *Pyatt*,[7] that after the amendment of 1926, Indian courts had no jurisdiction under the Indian Divorce Act to dissolve the marriage of persons who are not domiciled in India.

English Statute of 1926.

6.15. Certain problems arose in regard to the Act of 1926—the Indian and Colonial Divorce Jurisdiction Act—16 & 17 Geo. 5, Ch. 14,[1] for example, the question which High Courts are competent thereunder arose. But we are not concerned with those problems.

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[1]Act of 1921.

[2]Indian & Colonial Divorce Jurisdiction Act, 1926 (16 & 17 Geo. 5 C. 40).

[3]Indian & Colonial Divorce Jurisdiction Act, 1926 (3 & 4 Geo. 6 C. 35).

[4]Indian Independence Act, 1947 (10 & 11 Geo. 6 C. 30).

[5]*Attaullah* v. *Attaullah*, A.I.R. 1953 Cal. 590 (S. B.).

[6]*Wilson* v. *Wilson*, A.I.R. 1931 Lah. 245.

[7]*Pyatt* v. *Pyatt*, A.I.R. 1929 Lah. 565(1).

[8]*Waller* v. *Waller*, A.I.R. 1928 Lah. 557.

(*Chapter 6.—Jurisdiction under Indian Divorce Act, 1869. Chapter 7.—English common Law as to Recognition.*)

In a Sind case[1], the effect of the Indian and Colonial Divorce Jurisdiction Act of 1926, was noted and it was pointed out that while High Courts established by Letters Patent could exercise certain additional jurisdiction thereunder, other courts' jurisdiction was based exclusively upon domicile, and it was expressly held that the fact that the marriage was solemnized in India, or the adultery was committed in India, was of no consequence.

Indian law under the Indian Divorce Act as to domicile of wife.

6.16. In determining the domicile of the parties in a proceeding for dissolution of marriage, it is the domicile of the husband alone which is to be considered, inasmuch as a wife takes the domicile of her husband upon her marriage.[2]

Woman's domicile.

6.16A. If the husband has deserted his wife, the original domicile of the wife is not automatically revived, and the domicile acquired by her upon her marriage does not come to an end. This is well established by a series of decisions[3] in India.

Act of 1948.

6.17. We have referred to the U.K. Acts supplementing the Divorce Act.[4] The only other statutory exception to the requirement of Indian domicile by a party seeking a decree for divorce from an Indian Court under the Divorce Act is provided in the Matrimonial Causes (War Marriages) Act[5], which has been adopted on the lines of the similar English Act of 1944. The Act enables a wife married to a person domiciled *outside India*, to have the marriage dissolved or annulled on the grounds mentioned in the Indian Divorce Act[6], provided (a) the marriage was solemnised during the war period (Second World War), (b) the wife was immediately before the marriage domiciled in India, and (c) the parties have not, since the solemnisation of the marriage, resided together in the country of the husband's domicile. In addition, the parties must be Christians.

If these conditions (and certain other minor requirements not material for our purpose) are satisfied, the High Court shall have jurisdiction in, and in relation to, proceeding for nullity or divorce, 'as if both parties were at all material times' domiciled in India. The proceedings will be governed by the Indian Divorce Act. The Act also provides that the validity of any decree or order made in the U.K. under the U.K. Act of 1944—which is the corresponding U.K. Act—shall, by virtue of this Act, be recognised in all courts in India.

CHAPTER 7

ENGLISH COMMON LAW AS TO RECOGNITION

Scope of the Chapter.

7.1. The subject matter of this Chapter is the English common law on the subject of recognition of foreign divorces and decrees of judicial separation. We have already indicated its relevance to the present discussion.[7]

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[1] *Hall* v. *Hall*, A.I.R. 1933 Sind 72, 73.

[2] *Attaullah* v. *Attaullah*, A.I.R. 1953 Cal. 530, 534, 535.

[3] (a) *Prem Pratap* v. *Jagat Poleg*, A.I.R. 1944 All. 97, 100;
(b) *Rooke* v. *Rooke*, A.I.R. 1934 Bom. 230;
(c) *Linton* v. *Guderian*, A.I.R. 1929 Cal. 599, 601;
(d) *Sumathi Ammal* v. *D. Pant*, A.I.R. 1936 Mad. 324, para. 9-10 (Mocket, J. in order of reference);
(e) *Neelakantan* v. *Neelakantan*, A.I.R. 1959 Raj. 133, 134.

[4] Para. 6.12, *supra*.

[5] The Matrimonial Causes (War Marriages Act, 1948) (40 of 1948).

[6] The Indian Divorce Act, 1869.

[7] Chapter 6, *supra*.

Chronological developments—Domicile.

7.2. It would be convenient to deal with the subject chronologically, and to discuss the various developments in order of time.

The orthodox doctrine of English common law was that, in general, a foreign court is competent to grant divorce only if the parties are domiciled within its jurisdiction at the commencement of the proceedings of divorce. Such a divorce, but no other, would be recognised by English courts. The "domicile", for this purpose, is taken in the English sense. Mere temporary residence does not fall within the purview of "domicile"[1].

Lolley's case and subsequent decisions upto *Shaw* v. *Gould*.

7.3. This position, however, did not come to be established without considerable fluctuation in opinion. In *R.* v. *Lolley*[2], the opinion had been expressed that as to the dissolubility of marriage, regard was to be had to the *lex loci contractus*, and the "English marriage" could be dissolved only in England. This approach was, however, refuted by Lord Westbury in *Shaw* v. *Gould*[3].

Niboyet v. *Niboyet* (test of actual residence).

7.4. The majority decision of the Court of Appeal in *Niboyet* v. *Niboyet*[4] had laid down the principle of actual residence for the exercise of English domestic jurisdiction; but this decision retained only a temporary sway. The majority in that case would seem to emphasise the fact that the spouses *actually resided* in England, and were not merely present there casually or as travellers. On this basis, the English courts were (according to the majority view) competent to dissolve their marriage *even though the parties were not actually domiciled in England*. Of course, the issue in *Niboyet* was not one of recognition of a foreign judgment, but of the jurisdiction of English courts. However, its indirect impact on recognition could have been tremendous, if it had held its sway.

Le Mesurier v. *Le Mesurier*.

7.5. But *Niboyet*[5] did not retain its sway for long, and in *Le Mesurier* v. *Le Mesurier*[6], domicile was regarded as the only test for the exercise of jurisdiction. It was not a case relating to the jurisdiction of English courts, but had an indirect impact thereon. Since it was decision of the Privy Council, it did not formally overrule the decision in *Niboyet* v. *Niboyet*; but the rule laid down was unquestionably regarded as a rule valid for the exercise of jurisdiction *by English Courts* also.

Thus, in *Indyka's case*[7], Lord Wilberforce observed—"*Le Mesurier* was not a case concerned with recognition at all, but it would not be right merely to dispose of what was then said as *obiter dicta*. For, not only have later cases on recognition made it a ground of their decision, but also the reasoning itself rests on the hypothesis that a common legal structure can be found to contain both the domestic jurisdiction of English courts and recognition by them of foreign decrees."

Factors not affecting validity of decree.

7.6. After the decision in *Le Mesurier*[8], then, the principal criterion for recognition of a foreign divorce was that of domicile. If the foreign court has competence on the basis of the test of domicile, the decree passed by that court is unaffected—

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[1]*Shaw* v. *Gould*, (1865) L. R. 3 H. L. 55.
[2]*R.* v. *Lolley*, (1812) Russ & Ry. 237.
[3]*Shaw* v. *Gould*, (1868) Law Reports 3 House of Lords 55.
[4]*Niboyet* v. *Niboyet*, (1892) 4 P. D. 1.
[5]*Niboyet* v. *Niboyet*, Para. 7.4, *supra*.
[6]*Le Mesurier* v. *Le Mesurier*, (1895) A. C. 517 (P. C.).
[7]*Indyka* v. *Indyka*, (1967) 2 All E. R. 689, 720.
[8]Para. 7.4 and 7.5, *supra*.

(i) by the domicile or nationality of the parties at the time of the marriage[1];

(ii) by the law of the place where the marriage was celebrated; or

(iii) by the fact that the act constituting the ground of divorce was committed outside the jurisdiction of that court.

With reference to proposition (i) above, it may be stated that in *Harvey* v. *Farnie*[2], for example, the English court recognised the decision of a competent foreign tribunal which dissolved the marriage of a couple domiciled within its jurisdiction at the time of institution of the proceedings. The Court ignored the point that the woman was domiciled in England at the time of the marriage.

Decree recognisable by court of domicile.

7.7. The test of domicile was elaborated and subjected to certain refinements in course of time. One refinement may be noted in this connection. If the husband is domiciled in State X, and obtains a divorce in the courts of State Y, English courts will recognise[3] the validity of this decree, if it would be recognised by the courts of X.

Secondly, it was held[4] that it is irrelevant for this test whether the particular ground upon which the divorce is granted, by the foreign court would or would not be recognised by English municipal law.

It was also laid down that the decree will be recognised by the English court if the foreign court of competent jurisdiction applies local or any other law to grant the decree, even though that law differs from English law *as to the ground of divorce*. This rule is, however, subject to the doctrine of public policy.

Ground of jurisdiction immaterial.

7.8. Judicial decisions also made it clear[5], in 1958, that recognition would be granted where *facts* existed which would have given English Courts jurisdiction, even though the foreign court had assumed jurisdiction and granted a decree on a *ground* not recognised in English Courts as a ground for divorce. Thus, when applying this rule, the English Court is not concerned with *the ground* on which the foreign decree was granted, but with the facts in the context whereof it was granted.

The law in England on this subject is now to be found in statute[6], which we shall discuss later.

Result summary.

7.9. The result of these judicial decisions was that domicile of both parties was the principal test for the—(a) exercise of jurisdiction in divorce—by domestic English courts, and (b) recognition of a divorce,—granted by foreign courts.

To the general rule of domicile, additions were made in course of time. The first such addition[7] took place in 1953, when the principle was laid down that if a wife obtains a divorce in a foreign country where she is not domiciled, and the facts are such that the English courts would exercise jurisdiction to

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[1]See *Harvey* v. *Farnie*, (1882) 8 App. Cas. 43.

[2]*Harvey* v. *Farnie*, (1882) 8 App. Cas. 43.

[3]*Armitage* v. *A. G.*, (1906) Probate 135, approved by Lord Reid, Lord Pearce and Lord Wilberforce in *Indyka* v. *Indyka*, (1967) 2 All E. R. 689 (1969) 1 A. C. 33 (H. L.).

[4]*Bater* v. *Bater*, (1906) Probate 209.

[5]*Robinson Thod* v. *Robinson Thod*, (1958) Probate 1.

[6]English Act of 1971.

[7]*Travers* v. *Holley*, (1953) Probate 246.

entertain her petition for divorce (on the ground on which the foreign court exercised jurisdiction), then the divorce could be recognised in England. This rule owes its origin to the fact that in certain circumstances, an English court could itself exercise jurisdiction to hear the petition of a wife for divorce by virtue of a specific statutory provision even though the parties were not domiciled in England.

The Court of Appeal made another break into traditional principles, in the case of *Travers* v. *Holley*[1]. The question in that case was whether the English court could recognise as valid, a decree of divorce granted by the Supreme Court of New South Wales under legislation analogous to section 18 of the English Matrimonial Causes Act, 1950 (jurisdiction to grant divorce to the wife in certain cases). The Court of Appeal allowed recognition of a foreign decree based on a residential jurisdiction common to the English and the foreign law. "On principle it seems to me plain", said Somervell L.J., "that our courts in this matter should recognise a jurisdiction which they themselves claim." Hodson L.J. added: "The principle laid down and followed since the *Le Mesurier case* must be interpreted in the light of the legislation which has extended the power of the courts of this country in the case of persons not domiciled here."

Real and substantial connection.

7.10. In 1969, the House of Lords, in the case of *Indyka*[2], added a further ground, whereunder recognition is afforded to any foreign decree of divorce "wherever a real and substantial connection is shown between the petitioner and the country or territory which granted the decree." Of course, the facts of the case were rather complicated and, moreover, since several judgments were given by the various law lords, it has not been found easy to make any definite statement as to the proposition laid down by the House.[3] But, in general, the above is believed to be a fairly accurate statement of the gist of the decision, so far as is relevant to the question of recognition.

Grounds of recognition summed up according to position at common law.

7.11. On the basis of what we have stated above, the rules of English common law on the subject of recognition of a foreign decree of divorce or legal separation (apart from statute) could be summed up, by stating that such recognition would be granted by an English Court if—

(a) the parties were domiciled in the foreign country concerned[4]; or

(b) the decree is obtained by the wife, and the facts are such that the English Court would have jurisdiction[5] to grant divorce;

(c) the decree is such that though not granted by a court of domicile, it would be recognised by a court of domicile[6]; or

(d) a real and substantial connection is shown between the petitioner and the country which granted the decree[7].

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[1]*Travers* v. *Holley*, Probate 246, 251, 257.

[2]*Indyka v. Indyka*, (1969) A. C. 33 (H. L.).

[3]As to nullity, see *Law* v. *Gustin*, (1976) 1 All E. R. 113.

[4]Paragraph 7.2, *supra*.

[5]Paragraph 7.3, *supra*.

[6]Paragraph 7.6, *supra*.

[7]Paragraph 7.10, *supra*.

(Chapter 7.—English Common Law as to Recognition. Chapter 8.—Extra-Judicial Divorce.)

As to the last mentioned ground, however, it should be repeated that this ground, based on the case in the House of Lords in *Indyka* v. *Indyka*[1], is only a statement of the law as probably was laid down, and not as a very definite statement. In any case, the law on the subject is now to be found in the recent Act of 1971, which contains a statutory[2] provision which, in effect, bars the extension of the grounds of recognition.

Restrictions on recognition.

7.12. So much as regards the grounds on which recognition would be granted at common law. It is an over-riding requirement of recognising any foreign decree that it was not obtained fraudulently[3], or in circumstances which, according to fundamental principles of the English law, amounted to a denial of natural justice, or (according to one view) even substantial justice.

Indian law.

7.13. This brief discussion of the English law does not have mere academic interest, because, as we have already stated[4], in the absence of specific statutory provisions to the contrary, in general, English rules as to the conflict of law, that is, the rules existing on the subject in the *common law*, as unmodified by statute, would be of assistance.

CHAPTER 8

Extra-Judicial Divorces

I. INTRODUCTORY

Recognition of extra-judicial foreign divorces.

8.1. In discussing the English law of recognition, we have so far confined ourselves to the recognition or nonrecognition of foreign judicial divorces,—i.e., the competence of a *foreign court* to grant a divorce or judicial separation. We have not touched the more difficult question of recognition of foreign *extra*-judicial methods of divorce granted under the personal religious law of the parties. We shall now deal with it.

Scope and varieties.

8.2 By "extra-judicial" divorces we mean divorces where there is *no decree of the court.*

The varieties of extra-judicial divorces are numerous[5]. There may be some unilateral act,—as, for example, the unilateral act of the husband, known as 'talaq' in Muslim law[6] or the consensual act 'Chett' of Jewish law[7]—or there could be some other form.[8]

Sometimes, there may be a minor judicial formality also. At the trial in in *Russ* v. *Russ*[9], for example, evidence as to Egyptian law was given by Dr. Jamal Nasir, an advocate in Mohammedan law who had practised in Mohammedan courts in Egypt. The effect of his evidence was conveniently summarised by the judge in the course of his judgment, as follows:—

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[1]*Indyka* v. *Indyka*, para. 7.10, *supra.*

[2]Chapter 8, *infra.*

[3]*Middleton* v. *Middleton*, (1967) Probate 62.

[4]Chapter 4, *supra.*

[5]See para. 8.3 and 8.4, *supra.*

[6]Para. 8.6, *infra.*

[7]Para. 8.5, *infra.*

[8]See Para. 8.4, *infra* (enumeration of various forms).

[9]*Russ* v. *Russ* (1962) 1 All E. R. 649, 651, quoted by the Court of Appeal also in (1964) Probate 315.

"(a) Egyptian law recognises and gives effect to Mohammedan religious law as the personal law of a Mohammedan domiciled in Egypt.

(b) Under Mohammedan law a man may have four wives, in other words, marriage is potentially polygamous.

(c) Under Mohammedan law a man may divorce his wife irrevocably by pronouncing 'Talak' three times in the presence of witnesses. No judicial proceeding or investigation is required before a man exercised this right. The divorce is constituted by the unilateral declaration of the husband in the presence of at least two witnesses. The wife need not be present, nor be given notice of the intention to divorce.

(d) Egyptian law recognises, and gives effect to, a Talak divorce pronounced by a Mohammedan domiciled in Egypt. The marriage is recognised by Egyptian law as dissolved with effect from the date of the declaration; and this is so wherever the marriage was solemnised. It gives effect to the dissolution in a number of ways; for instance, Talak may be and almost always is pronounced before an authorised officer of the Egyptian court concerned with questions of personal status, whose duty it is to record the divorce in the records of the court. The record then constitutes, as Dr. Nasir was at pains to point out, the solemn recognition by the courts of Egypt of the fact of divorce. And the parties to the dissolved marriage may have recourse to the appropriate Egyptian court in matters of the maintenance and support of the divorced wife."

II. CLASSES OF EXTRA-JUDICIAL DIVORCES

Classes.

8.3. Extra-judicial divorces could be broadly classified into those dependent entirely on the parties' volition and those requiring the approval of some authority. The authority, again, may be administrative, religious, quasi-judicial or judicial. Often, the administrative or other authority does not make an independent inquiry, but merely sets its *imprimatur, by way of record,* upon the formalities undergone by the parties. Again, reverting to the first class of extra-judicial divorces—i.e., divorces purely by action of the parties, the divorce may be effected by act of one party, or it may require the concurrence of both. To some extent, this endless variety and numerous classes of extra-judicial divorces have contributed to the obscurity of the position regarding their recognition that prevails in England[1].

8.4. Writing in 1952, Graveson[2] classified extra judicial divorces as—

(i) unilateral;

(ii) consensual;

(iii) pronounced by some non-judicial authority of *the State,* whether legislative or executive; or

(iv) religious.

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[1]See para. 6.8, et seq., *infra.*

[2]Graveson, "Recognition of Foreign Divorce Decrees" (1952) 37 Grotius Society Transactions 149, 160.

But he added that of these, the fourth case—religious divorces—would seem to fall either into the category of unilateral divorces, in which some religious official takes a minor part; or into the broad class of judicial divorces, as in the Rabbinical law[1].

For our purposes, it is sufficient to bear in mind that divorces entirely dependent on the act of parties present greater problems than divorces requiring some kind of formal 'proceeding'. This will be evident from the discussion of the words "judicial proceeding" in the later paragraph of this Chapter[2].

Examples of extra-judicial divorces.

8.5. A few examples of extra-judicial divorces may now be referred to. A Jewish divorce is effected by the husband delivering a Ghat (bill of divorcement), i.e., a written document, to his wife. *The consent of the wife is essential to the divorce.* The ceremony takes place before "a Rabbi and two witnesses". The divorce, however, takes effect by the act of the husband; the requirement of the rabbi and witnesses is more to authenticate the delivery and to ensure that moral grounds exist for the divorce and that the parties both consent and understand the nature of the act.[3]"

8.6. A Muslim divorce in the Talak form is traditionally effected by the husband pronouncing three time the word "Talak" (I divorce you). The wife need not be present, and she need not be given prior notice of the intention to divorce her.

According to ancient Islamic law, these procedures can be undergone without any reference to any court or other authority. In modern times, however, the civil authorities in many Muslim countries do require further formalities which make the act of divorce more public, or (as in Pakistan and Egypt) give greater protection to the wife[4].

III. ENGLISH LAW BEFORE 1971

Extra-judicial divorces.

8.7. As to extra-judicial divorces, the English rules of recognition before 1971 developed mainly in relation to polygamous marriages and underwent many changes. Initially, there was reluctance to recognise them, but later, there was greater readiness to do so.

The leading English case on extra-judicial divorces is *Har shefi*[5]—to which we refer here because the rule laid down therein was valid at least when the Act of 1971 was passed. In that case, a domiciled English woman married a domiciled Israeli in Israel. For a time they lived together in England, though at all material times the husband retained his domicile in Israel. The husband delivered to the wife in England a Jewish "bill of divorcement", purporting to dissolve the marriage, and returned to Israel. The wife remained in England. She sought a declaration in the English courts that her marriage had been

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[1](a) *Sasson* v. *Sasson*, (1924) A. C. 1007 (P. C.).
(b) *Priger* v. *Priger*, (1925) 42 T. L. R. 281.
(c) *Spivack* v. *Spivack*, (1930) 46 T. L. R. 243.

[2]Para. 8.13 *et seq.*, *Infra.*

[3]See 37 Modern Law Review at page 611.

[4]See 37 Modern Law Review at page 612.

[5](a) *Har Shafi* v. *Har Shafi* No. 1 (1953) 1 All E. R. 983. For comments, see (1953) 30 S. Y. B. I. L. pages 524-527.
(b) *Har Shafi* No. 2 (1953) 2 All E. R. 373.

validly dissolved and no longer subsisted, or, alternatively, that she was no longer married to the respondent.

It was argued on behalf of the wife that, following the divorce, the wife had resumed her English domicile of origin and that was sufficient to give the court jurisdiction to declare her status. Denning L.J. said: "Now that involves a nice question, whether she has resumed her English domicile, and that depends on whether the divorce was valid or not. If the divorce was valid, she was free to resume her English domicile and she has in fact resumed it; but if the divorce was invalid, she is still married to her husband and she retains his domicile. So the jurisdiction of the court depends on the validity of the divorce; and that depends in turn on the law of Israel. I do not think that we should send the wife to Israel to determine that question. The English courts can hear evidence of Israel law and can decide whether the divorce was valid by that law or not. If it was valid by that law, then the English courts have jurisdiction to declare it to be so."

The divorce was ultimately recognised, because it was valid *by the law of domicile.*

8.8. Thus, in *Har Shafei* v. *Har Shafei*[1], where the question of recognition arose in relation to a Jewish divorce by delivery of a bill of divorcement, it was implicit in the decision of the court of appeal that the question depended, not on the existence of *any decree*, but on whether such a divorce would be recognised by the court of the domicile, viz., the Republic of Israel. In Sasson v. Sasson, 1-[2] the decision of the Privy Council was founded on the fact of recognition by the court of domicile of the validity of a similar Jewish divorce. *Armistage* v. *A. G.*,[3] shows that a divorce will be recognised, notwithstanding that there is no decree of the court of the domicile, provided it is proved that it would be recognised by the court of the domicile.

In *Ratanachai* v. *Ratanachai*[4], recognition was accorded to divorces valid by the law of the domicile, even though not pronounced by any court.

Judicial law.

8.9 The view that English law will not recognise a foreign divorce unless "decreed by a court of law" or "*involving some judicial process*" has not, thus, found favour.[4] The Court of Appeal in *Russ* (*ors, Geffers*) v. *Russ*[5] did, however, expressly rely on the fact that the foreign divorce involved some *judicial* process as a feature distinguishing it from the *Hammersmith Marriage Case*[6].

In the case of *Lee* v. *Lau*[7] an agreement of divorce entered into by a husband and wife in Hongkong, which had been unaccompanied by any judicial act, was held to have validly dissolved the marriage between them. In this case, the husband and wife were born in Hongkong, and lived there during their childhood.

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[1]*Har Shafei* (1953) 1 All ER 783.

[2-3]*Sasson* v. *Sasson*, (1924) A. G. 1007.

[3]*Armitage* v. *A. G.* (1906) *Probate* 135.

[4]*Ratanchai*, v. *Ratanchai*, (June 3, 1960), "The Times", June 4, 1960, cited in *Russ* v. *Russ.* (1964) Probate 315.

[4]Kennedy in (1957) 35 Can. Bar R. 642, 645; Cowen (1952) 68 L. Q. R. 88, 92.

[5]*Russ* v. *Russ.* (1964) Probate 315.

[6]*Hammersmith Marriage case*, (1917).

[7]*Lee* v. *Lau*, (1964) 2 All E. R. 248; Comment by Webb in (1965) 28 Modern Law Rev. 109.

In *Manning* v. *Manning*[1] a Norwegian divorce was recognised by the English court. It had been granted not by a court of law, but by an administrative authority,—the County Governor of Beggen

8.10. On the basis of the above case law, the position before 1971 can be summed up as follows: Position summed up.

(a) If, by the law of domicile, the married status has been extinguished, parties.

(b) If, by the law of domicile, the married status as been extinguished, that fact should be recognised in England[2].

The question thus turned solely on the domicile of the parties at the time of the dissolution.

(i) If the parties were, at that date, domiciled in England, the divorce had no effect on their marriage, according to English law[3].

(ii) But, if, at that date, the parties were domiciled abroad in a country, the law of which recognised that the parties (or one of them) had a power effectively to put an end to the marriage without the need for recourse to the courts, then the exercise of such a power validly dissolved the marriage in English law[4].

(c) For this purpose, it is not relevant for the court to ask either where the mariage was celebrated, or even where the dissolution was effected. Consequently, the English courts have recognised a talaq divorce even though the marriage had been celebrated in England in accordance with the requirements of English law and the non-judicial procedure had taken place in England[5].

IV. ACT OF 1971

8.11. We may now discuss the position under the English Act of 1971—the Recognition of Foreign Divorces and Separations Act, 1971 regarding extra-judicial proceedings. In the Act[6] of 1971, under section 2, divorce by "judicial or other proceedings" is recognised, subject to the other conditions laid down in the Act. It is not, however, clear if these words cover "Talaq". If these words cover 'talaq' then, as is often pointed out, the only protection of the wife is that she must be given notice of the proceedings"[7] and recognition may be withheld if the proceedings are mainfestly contrary to public policy[8]. Position regarding extra-judicial divorces under Act of 1971.

8.12. But is should be pointed out that "public policy" has rarely been invoked in this area of the law. So, one has to face the question whether "proceedings" in this Act includes a 'talaq'. This is not an easy question to answer.

[1]*Manning* v. *Manning*, (1958) 1 All E. R. 291, Comment by Unger in (1958) 21 Modern Law Review 415.

[2]See, for example, Qureshi v. Qureshi, (1972) 1 All E. R. 325.

[3]*Preger*, v. *Preger*, (1926) 42 T. L. R. 281, 283.

[4]*Har Shafei* v. *Har Shafei* (No. 2) (1953) Probate 220, 224.

[5]*Qureshi* v. *Qureshi*, (1971) 1 All E. R. 325.

[6]Section 2, Act of 1971.

[7]Section 2, Act of 1971.

[8]Section 8(2) (b), Act of 1971.

Expression "Judicial or other proceedings".

8.13. The Act of 1971, section 8, sub-section (2)(b), applies its provisions to divorce which has been obtained by means of "judicial or other proceedings", in any country outside the British Isles, if they are "effective under the law of that country". The question whether "proceedings" includes extra judicial divorces was inconclusively discussed in the House of Lords[1a] in the debates on the Bill.

In the case of *Randwan*[2], decided after the Act of 1971, it was assumed, but not decided, that section 2 of the Act[3] of 1971 was applicable to an extra-judicial divorce, it being "other proceedings" within the meaning of section 2.

Position under Act of 1971.

8.14. In view of the ambiguity of the words "other proceedings" in the English Act[4] of 1971—an ambiguity which is found[5], also in the relevant paragraph of the Hague Convention[6-7] it appears that it is possible to take the view that extra-judicial divorces—(i) are not governed by the Act of 1971, and (ii) are governed by the Common law.

8.15. It cannot be said that the problem is new. It may be noted that the Royal Commission on Marriage and Divorce[8] had recommended the recognition of a foreign divorce *"obtained by* judicial process or otherwise" which has been granted in accordance with the law of the country in which one spouse was, or both spouses were, domiciled at the time of the proceedings.

V. 1973 ACT

Act of 1973 in relation to English divorces.

8.16. At this stage, we may also state that the position as regards extra-judicial divorces pronounced by a party or by a non-judicial authority *in the United Kingdom* has now been changed by section 16(1) of the Domicile and Matrimonial Proceedings Act, 1973, which provides that "No proceeding in the United Kingdom, the Channel Islands or the Isle of Man shall be regarded as validly dissolving a marriage unless instituted in the courts of law of one of these countries". However, under section 16(3), this provision does not affect the validity of any divorce obtained before 1974 which would be recognised as valid under the previous recognition rules, i.e., under the common law rules.[9] Thus, section 16 appears to deny recognition to any *extra-judicial divorce* obtained *in England* after 1973, and reverses the decision in a case like *Qureshi* v. *Qureshi*.[10]

But ambiguity survives as to *overseas* divorces, obtained extra judicially.

Literature.

8.16A. In a recent issue of the Law Quarterly Review[11], the question of extra-judicial divorces has been considered, and the earlier article[12] on the subject has been referred to. The discussion shows that the position is not certain.

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[1]For House of Lords Debates, see Vol. 315, Volume 483 to 497, Vol. 316, Col. 1043 to 1051, and Vol. 322, Col. 851 and 854.

[1a]For Debates in the House of Commons, see para. 8:18 *infra*.

[2]*Randwan* v. *Randwan*, (1972) 3 W. L. R. 735, 739.

[3]Para. 8.4, *supra*.

[4]Para. 8.5, *supra*.

[5]See, further, para. 8:19 et. seq., *infra*.

[6]Article 1 of the Hague Convention.

[7]Para. 8.17, *infra*.

[8]Royal Commission Report, Omd. 9678 (1956), draft s. 8.

[9]Section 16, The Domicile etc. Act, 1973.

[10]*Qureshi* v. *Qureshi* (1971) 3 All E. R. 315.

[11]Jafrev, "Recognition of Extra Judicial Divorces" (Note); (1975 July) 91 Law Quarterly Review 320.

[12]North, "Recognition of Extra-Judicial Divorces", (1975) 91 Law Quarterly Review 36.

VI. UNCERTAINTY UNDER 1971 ACT

Debates in Hague Conference.

8.17. Thus, the position regarding overseas extra-judicial divorces is uncertain, so far as their recognition in England is concerned.

Article 1 of the Hague Convention refers to the recognition of divorces and legal separations "which follow judicial or other proceedings, officially recognised in the State where the divorce was obtained." The use of the phrase "other proceedings" appears in the first original draft convention, and it is stated in the commentary thereon that[1]—

> "the term proceedings shows that only those forms of the severing of marital bonds fall within the Convention, where it is an official authority, independent of the parties, that has acted. The officers, e.g. of a notary public, who would act at the request of the husband only and would merely take official notice of the repudiation of the wife, would be removed from the Convention."[2]

However, a number of States were uneasy as to the scope of the requirement of "proceedings", and specially whether that requirement would permit recognition of Jewish and Muslim divorces[3]. The United Kingdom proposed an amendment to clarify the situation so that the Convention would apply "whatever be the forms or methods of divorce which the State provides or permits."[4]

The United Kingdom amendment was, however, rejected although doubt was expressed as to whether some forms of divorce, for example, 'talak' divorce would fall within the original draft.

Debates in House of Commons.

8.18. During the debates on the Recognition of Divorces and Legal Separations Bill, 1971, implementing the Hague Convention, concern was expressed in the House of Commons, both in Committee[5] and on the Report stage[6], over the meaning of the words "other proceedings" in section 2 of the Act of 1971. Amendments were[7] introduced to make more specific provisions for talak and other informal divorces. The main cause for concern was whether the use of "proceedings" in other sections of the Act[8] did not pre-suppose:

> "Some sort of quasi-judicial nature and involve some kind of decision by some person or tribunal in regard to contending parties, or parties that may be able to contend, rather than simply the pronouncement of a divorce by one party to the marriage."[9]

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[1]Some of the material as to Article 1 of the Convention is taken from P. M. North, "Extra-jdicial divorces" (1975) January, 91 L. Q. R. 36, 48 to 50.

[2]Proceedings of 11th Session, Hague Conference 1970 at page 19, and see at page 58,

[3]Proceedings of 11th Session, Hague Conference (1970), at pages 76, 81, 83,

[4]Proceedings of 11th Session, Hague Conference (1970), at page 94.

[5]Standing Committee B, June 22, 1971, Cols. 3-10.

[6]H. C. Debates, Vol. 821, Cols. 165-171 (12th July, 1974).

[7]E. G. Mr. Silkin, "act or proceeding".

[8]Sections 3, 4, 5, 8.

[9]Standing Committee B. June 22, 1971, Col. 4.

"Single act or event" whether covered by "other proceedings".

8.19. A further problem that was discussed during the debates on the Bill, was whether "other proceedings" was an apt phrase to cover a divorce by a *single act or event*, as in some cases of talak, rather than the more usual case of a sequence of event[1]. However, these objections were not accepted by the then Solicitor-General[2] who pointed out that the Act is not intended to afford recognition to all informal divorces, but only to those which have the nature or quality of an official act[3].

Mr. Silkin[4] proposed the insertion of words to make it read "judicial or *other act* or proceedings." But the Solicitor-General said[5], "I suggest that the inclusion of the words 'or other proceedings' at least makes it plain, first of all, that the other proceedings need not themselves be judicial, as I think the hon. and learned Gentleman accepts.

"It follows that the other proceedings can include administrative proceedings, including possible registration in a Government office or divorce by legislation. It can also include proceedings which do not involve the intervention of an official; a formal series of steps following a strict legal pattern such as those taken in a talak divorce, where the official plays no part and where no official step is necessary to register them."[6]

"The hon. and learned gentleman's point is so far so good, but "proceedings" implies a sequence of measures, a degree of formality and bureaucracy and judiciality which could result in excluding from the Bill some single act taken by the parties resulting in divorce by the country in which that act is being taken. The difficulty is that if one takes a single step like that, *an act as opposed to proceedings*[6], or even a proceeding—which was one of the alternatives I thought of at one time—one might arrive at a proceeding so informal as to make it difficult to bring it within the frame-work of this kind of recognition.

The Bill, and any Bill of this kind, must depend on the possibility of identifying a *particular moment of time* jurisdictionally at which the act or proceeding can be identified between the act and the jurisdiction under whose law the matter would be valid."

8.20. Intervening at this stage, Mr. Silkin said :

> "Would the informality matter so long as the country concerned accepted the validity of the divorce or legal separation resulting from it ? Is not that the key to the intent of the Convention ?"
>
> To this, the Solicitor-General replied—
>
> "I hesitate to go back to analysing the intent of the Convention, but in terms of finding the key to what is workable and acceptable in this country the point must be that if we are providing for a quick, auto-

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[1]H. C. Debates, Vol. 821, Cols. 167-168 (12th July, 1974).
[2]Sir Geoffrey Howe.
[3]H. C. Debates, Vol. 821, Cols. 169-170 (12th July, 1974).
[4]Mr. Silkin K. C. now Attorney General.
[5]H. C. Debates, Vol. 821, Cols. 169-170.
[6]Emphasis added.

matic machinery for the recognition, which is really what the Clauses do, it should be possible to identify quickly and automatically the nature of the act or proceedings which qualified for recognition and be satisfied that at the time the act or proceeding was taken or was taking place the necessary jurisdictional link of nationality or whatever it may could be fulfilled."

8.21. The Solicitor General elaborated the point in these words—

"If one looks at that in the context of the word 'act', for example, rather than 'proceedings' and then at a judicial act, one immediately runs into possible difficulties in deciding whether the judicial act in question is the service of the petition or the granting of the decree *nisi* or of the decree absolute. One is not then able to identify it with any clarity because under clause 3 as it stands we have".....at the date of institution of the proceedings....."

"If we insert

".....at the date of the act or of the institution of the proceedings.....",

we become a little uncertain on that ground."

The Solicitor-General wound up his comments by saying—

"I suggest to the hon. and learned Member and to the House that the answer to his problem is to say that when we reach a proceeding or act as informal as that which he has in mind, the parties would have to rely on the provisions of Clause 6 which enables a divorce and legal separation which is valid by virtue of a rule of law arising from the domicile of the parties still to be recognised in this country, but it requires it to go through an *admittedly rather more complex means of proof and establishment of recognition.* But that is the long stop and the safety net, which is sufficient to deal with this problem."

The matter rests there, so far as interpretation of the Act of 1971 is concerned.

Ambiguity of words "or other proceedings"—Need to cover extra-judicial divorces.

8.22. The above discussion would show that the words "or other proceedings" are not clear enough to cover extra-judicial divorces,—at least those divorces which do not take place before an authority.

VI. RECOMMENDATION

Conclusion.

8.23. For these reasons, it is desirable to provide that the proposed Bill should apply to non-judicial divorces also. This could be achieved by defining "proceeding" as including any act which might be legally sufficient to effectuate a dissolution of marriage, however informal that act might be, and whether or not any formalities or legal process is required. It may also be provided that the word "institution" shall, where the proceedings are not before any authority but are constituted by any other act, mean the commencement of that act.

CHAPTER 9

THE HAGUE CONVENTION

Introductory.

9.1. We shall, in this Chapter, summarise the important provisions of the Hague Convention[1].

Scope of the Convention.

9.2. The scope of the Convention is dealt with in Article 1. The Convention shall apply to the recognition, in one contracting State, of divorces and legal separations obtained in another contracting States which follow *judicial or other proceedings* officially recognised in that State and which are legally effective there.

The same Article (Article 1) provides that the Convention does not apply to findings of fault or to ancillary orders pronounced on the making of a decree of divorce or legal separation; in particular, it does not apply to orders relating to pecuniary obligations or to the custody of children.

Obligation to recognise—habitual residence and nationality.

9.3. Article 2 provides that divorces and legal separations to which the Convention applies[2] shall be recognised in all other Contracting States, subject to the remaining terms of this Convention, if, at the date of the institution of the proceedings in the State of the divorce or legal separation (referred to as "the State of origin"), –

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

(2) the petitioner had his habitual residence there and one of the following further conditions was fulfilled—

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

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

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

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

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

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

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

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

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

Domicile.

9.4. Under article 3, where the State of origin (State of divorce etc.) uses the concept of domicile as a test of jurisdiction in matters of divorce or legal separation, the expression "habitual residence" in Article 2 shall be deemed to include domicile as the term is used in that State.

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[1]For text of the Convention, See (1969) 18 I. C. L. Q. 657.

[2]Articles 1, para. 9:7, *supra*.

Nevertheless, this proposition shall not apply to the domicile of dependence of a wife.

Cross-petitions.

9.5. Article 4 makes it clear that where there has been a cross-petition, a divorce or legal separation following upon the petition or cross-petition shall be recognised if either falls within the terms of Articles 2 or 3.

Legal separation converted into a divorce.

9.6. Under Article 5, where a legal separation complying with the terms of this Convention has been converted into a divorce in the State of origin, the recognition of the divorce shall not be refused for the reason that the conditions stated in Articles 2 or 3 were no longer fulfilled at the time of the institution of the divorce proceedings.

Findings of fact.

9.7. The first paragraph of article 6 provides that where the respondent has appeared in the proceedings, the authorities of the State in which recognition of a divorce or legal separation is sought shall be bound by the findings of fact on which jurisdiction was assumed.

Law.

9.8. Under the second paragraph of article 6, the recognition of a divorce or legal separation shall not be refused—

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

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

Merits.

9.9. Under the third paragraph of article 6, "without prejudice to such review as may be necessary for the application of other provisions of this Convention, the authorities of the State in which recognition of a divorce or legal separation is sought shall not examine the merits of the decision."

Refusal to recognise.

9.10. Article 7 states that contracting States may refuse to recognise a divorce when, at the time it was obtained, both the parties were nationals of States which did not provide for divorce and of no other State.

Notice.

9.11. Under article 8, if in the light of all the circumstances, adequate steps were not taken to give notice of the proceedings for a divorce or legal separation to the respondent, or if he was not afforded a sufficient opportunity to present his case, the divorce or legal separation may be refused recognition.

Incompatibility with previous decision.

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

Public policy.

9.13. Under article 10, contracting States may refuse to recognise a divorce or legal separation if such recognition is manifestly incompatible with their public policy ("order public").

Remarriage.

9.14. Article 11 provides that a State which is obliged to recognised a divorce under this Convention may not preclude either spouse from remarrying on the ground that the law of another States does not recognise that divorce.

(*Chapter 9.—The Hague Convention. Chapter 10.—English Act of 1971 as to Recognitions.*)

Suspension of proceedings.

9.15. Under article 12, proceedings for divorce or legal separation in any Contracting State may be suspended when proceedings relating to the matrimonial status of either party to the marriage are pending in another Contracting state.

Other provisions.

9.16. Articles 13 to 16 deal with certain matters relevant for ascertaining the legal system applicable.

Article 17 saves more favourable rules of recognition.

Articles 18 to 31 deal with certain miscellaneous matters, including reservations, accession to the Convention, interpretation and so on.

CHAPTER 10

ENGLISH ACT OF 1971 AS TO RECOGNITION

I. INTRODUCTORY

Introductory.

10.1. We shall, in this Chapter, summarise the important provisions of the recent English Act on the subject of recognition.[1] We may make it clear at the outset that we shall concentrate on the important provisions relevant to grounds or recognition, and shall not go into various matters of detail. We may also make it clear that the English Act, besides dealing with the recognition of overseas decrees, also contains provisions as to the recognition of decrees in the British Isles,[2] but we shall not refer to provisions relating to such decrees, as they are not of any importance for our purpose.

II. MAIN PROVISIONS

General provisions in the English Act as to recognition.

10.2. As respects recognition in Great Britain of the validity of overseas divorces and legal separations, the first provision is contained in section 2 of the Act, which provides that sections 3 to 5 of the Act shall have effect, subject to section 8, in regard to divorces and legal separations which—

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

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

Section 3(1)— The grounds for recognition mainly dealt with in section 3.

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

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

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

It may be noticed that this sub-section does not speak of domicile. That is dealt with separately.[3] It may also be pointed out, that the habitual residence or nationality *of either spouse* is sufficient to confer competence on the foreign court, whose decree is now the subject-matter of recognition. This represents

[1]The Recognition of Foreign Divorces and Legal Separations Act, 1971 (Chapter 53).
[2]For example, section 1 of the English Act of 1971.
[3]*Para.* 10:4 and 10:10, *infra*—Section 3(2).

the most important departure from the conventional English rule under which, subject to certain additions or qualifications, the test of domicile *of both the parties* is the test for the recognition of foreign decrees.[1]

Section 3(2) of the Act of 1971.

10.4. It should be pointed out in this connection, that section 3(2) of the Act of 1971 provides that in relation to a country, the law of which uses the *concept of domicile* as a ground of (domestic) jurisdiction in matters of divorce or legal separation, sub-section (1)(a) of section 3—that is to say, the test that either spouse must be habitually resident in the foreign country[2]—shall have effect as if the reference to habitual residence included a reference to "domicile within the meaning of that law". Broadly stated, the effect of this provision is that if the foreign country itself adopts the test of domicile as the test of jurisdiction in granting divorces for its own internal purposes, a decree of court of that foreign country,—being a foreign country in which either spouse was domiciled at the date of the institution of the proceedings,—would be recognised in England. It is obvious that in part, this sub-section preserves the English 'common law' rule of recognition on the ground of domicile, but, in part, it modifies that rule, since it is enough that *either spouse* is domiciled in the foreign country. It is not necessary that both[3] must be so domiciled.

Section 3(3) of the Act of 1971, country comprising various territories.

10.5. It would be noticed that the provisions in the English Act relating to grounds for recognition, which have been so far summarised, speak of "the country" in which the decree was obtained and of "the law" of the country. Now, as is well-known, there are countries where, by reason of the federal structure, the various territories forming part of the country are governed by different systems of law in matters of divorce or legal separation.

Provision had to be made for such countries, and section 3(3) of the Act of 1971 provides that "in relation to a country comprising territories in which different systems of law are in force in matters of divorce or legal separation, the foregoing provisions of this section (except those relating to nationality) shall have effect as if such territory were a separate country."

Section 4 of the Act of 1971—(i) Cross proceeding and (ii) Legal separation converted into a divorce.

10.6. Section 4 or the Act of 1971 contains two provisions. Sub-section (1) provides that where there have been cross-proceedings, it is sufficient if the jurisdictional tests mentioned in section 3(1), (a) and (b), are satisfied either as regards the original proceeding or as regards the cross proceeding, and it is immaterial which of the two led to the decree of divorce or legal separation. This is not the precise language of the sub-section, but it is its gist is stated in simple terms.

To take a hypothetical case, if—(i) the wife applies for divorce in a jurisdiction where she was habitually resident, and (ii) later, the husband, who is neither a resident of that country nor a national of that country nor domiciled in that country, brings cross proceedings for divorce, and (iii) the wife ceases to be habitually resident in that country, the decree in the husband's favour, if ultimately passed, will nevertheless be recognised in England, by virtue of section 4(1). The fact that the wife was habitually resident at the time of her petition, serves to validate the decree on *the husband's proceeding*, even though, for the husband's proceeding, the jurisdictional test is not satisfied in this case.

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[1]Chapter 7, *supra.*

[2]Para. 10:3, *supra.*

[3]Para. 10:3, *supra.*

Section 4(2) enacts that where a legal separation, the validity of which is entitled to recognition by virtue of section 3 or section 4(1), is converted, in the country in which it was obtained, into a divorce, the validity of the divorce will be recognised whether or not it (the divorce) would itself be entitled to recognition by virtue of those provisions.

Stated in simple language, this sub-section provides that in such cases the jurisdictional criteria laid down in section 3 need be satisfied only at the date of the institution of the proceedings for legal separation in the foreign country, and it is immaterial that, at the time when the subsequent proceedings for converting the decree of separation into divorce are instituted, the parties do not satisfy any of the tests laid down in section 3. This provision is intended to apply to decrees of those countries under whose legal systems a separation can be automatically converted into a divorce at the end of a prescribed period. An example usually given of such a country is Denmark and it may be useful in relation to Belgium and France also.

Section 5 of the Act of 1971—Proof of facts relevant to recognition.

10.7. The question can arise whether the finding of fact on the basis of which the foreign court assumed jurisdiction is binding on the court in which the question of recognition of the decree of divorce or legal separation passed by the foreign court arises. Such a problem, in fact, arose in the United States in the case of *Williams* v. *North Carolina*.[1] In that case, the question arose whether a decree of divorce granted by a court in Nevada, was entitled to full faith and credit in North Carolins. Under the law, as applied by the courts of North Carolina, the decree would be entitled to recognition if it was based on domicile in the State of Nevada. But the question that fell to be considered was whether the finding of the Nevada court, of facts amounting to domicile, was itself binding on the North Carolina court. It was held that it was not conclusive.

Previously, there was some confusion in the U.S.A. on the subject in relation to sister state judgments. The confusion had stammed from the famous case of *Haddock* v. *Haddock*,[2] which delimited earlier cases on jurisdiction and full faith and credit. In the *Haddock* case, a husband had secured a divorce at his new domicile in Connecticut, after wrongfully deserting his wife at their last common domicile. New York, where the wife's domicile remained. The United States Supreme Court held, that New York need not give any faith and credit to the Connecticut decree, though the Supreme Court did not declare that the decree was void. This created some confusion.[3] The confusion persisted until 1942 when, in the first *William's case*[4] the United States Supreme Court expressly overruled the Haddock decision and declared that an *ex parte* divorce decree granted by a state which was the domicile of the suing plaintiff was not only valid under the due process clause, but was also entitled to full faith and credit in sister states.

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[1] *Williams* v. *North Carolina*, No. 2 (1945) 325 U. S. 226.

[2] *Haddock* v. *Haddock*, (1906) 201 U. S. 562.

[3] Baale, "Haddock Revisited" (1926) 39 Harv. L. Rev. 417.

[4] *Williams* v. *North Carolina* (1942) 317 U. S. 287. This was a prosecution for illegal cohabitation in North Carolina with a purported second spouse, after Nevada divorce from a first spouse.

The second *Williams case*[1] held that collateral enquiry was permissible to determine whether the plaintiff securing the *ex parte* decree was actually domiciled in the state granting it. There were, however, some dissenting judgments. This case has not been followed in Australia in cases relating to sister state decrees.

English Act.

10.8. In England, such problems are dealt with by section 5(1) of the Act of 1971. Section 5(2) of the Act makes it clear that "finding of fact" includes, in this context, the finding about habitual residence or domicile or nationality.

Section 5 reads—

Proof of facts relevant to recognition

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

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

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

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

Mixed finding—Section 5(2) of English Act.

10.9. It is well-known that the findings of a court often involve mixed questions of fact and law. The precise finding that a spouse is habitually resident or domiciled in, or a national of, the country, could be a mixed finding of fact and law, inasmuch as the attribution to a person of domicile, nationality, or habitual residence, may involve not only an inference from the facts, but also a number of legal conclusions. Section 5(2) of the English Act of 1971 has the effect of making *the whole finding of the foreign* court conclusive evidence or sufficient proof, as the case may be. It avoids any objection being raised that the precise finding as to domicile was not *one of pure fact.*

III. EXISTING GROUNDS—DOMICILE

Section 6 of the Act of 1971—Certain existing rules of recognition to continue in force.

10.10. Since the Act of 1971 was not passed on a clean slate but after the evolution of a number of rules of the common law relating to recognition, and after the enactment of a few statutory provisions pertinent to the question of matrimonial jurisdiction, it became necessary for the U. K. Parliament to decide how far the new Act was to be regarded as exhaustive of the law. The matter was dealt with in section 6, which, as originally enacted,[2] was as follows:—

[1] *Williams* v. *North Carolina*, (1945) 325 U. S. 226. In the same prosecution, North Carolina found that the plaintiff had no Nevada domicile and conviction was sustained. See *Rice* v. *Rice*, (1949) 336 U. S. 674.

[2] For 1973 amendment, see para 10-13, *infra.*

"6. This Act is without prejudice to the recognition of the validity of divorces and legal separations obtained outside the British Isles—

(a) by virtue of any rule of law relating to divorces or legal separations obtained in the country of the spouses' domicile or obtained elsewhere and recognised as valid in that country;

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

but save as aforesaid, no such divorce or legal separation shall be recognised as valid in Great Britain except as provided in this Act."

Effect of Section 6(a) on common law.

10.11. The effect of clause (a) of the section is to retain those common law rules or recognition which relates to divorces or legal separations—

(i) obtained in the country of the spouses' domicile; or

(ii) obtained elsewhere but recognised as valid in the country of the spouses' domicile.

The first situation covers the proposition laid down in the case of *Le Mesurier*,[1] under which a divorce or legal separation is recognised by English Courts if it is granted by a Court of the country where the parties are domiciled.

The second situation dealt with in clause (a) covers what is known as the rule in *Armitage* v. *Attorney-General*,[2] under which a divorce or legal separation will be recognised in England if it is recognised as valid in a country where the parties are domiciled at the commencement of the proceedings, even though they were not domiciled in the country whose Court granted the decree.

Section 6(f) other enactments.

10.12. Besides preserving these two common law grounds of recognition, section 6 preserves grounds of recognition provided for by *any other enactment*. It is unnecessary to enumerate the enactments of the U. K. Parliament on the subject, but it will be of interest to mention that one of them[3]—the Indian Divorces (Validity) Act—dealt with divorces granted by Indian Courts. This enactment came to be passed, because Courts in India had been exercising jurisdiction in divorce under the Indian Divorce Act, 1869 over Britons resident in British India, *though not domiciled therein*. Since, under the rules of private international law, those decrees were not valid, decrees so passed had to be validated by an Act of the U. K. Parliament. It may also be stated that in times of war, special legislation is passed regarding war marriages.[4]

Having provided for the preservation of some of the common law grounds and of the statutory grounds, section 6, in the last sentence, takes care to abolish all other grounds of recognition. In particular, the grounds of recognition laid down in *Travers* v. *Holley*,[5] and in *Indyka* v. *Indyka*,[6] are no longer valid in England, because the last sentence of section 6 specifically provides that "no such divorce" or legal separation (that is to say), a divorce or legal separation obtained outside British Isles "shall be recognised as valid in Great Britain except as provided in this Act."

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[1] *Le Mesurier* v. *Le Mesurier*, (1895) A. C. 517 (P. C.).

[2] *Armitage* v. *Attorney-General*, (1906) Probate 135.

[3] Indian Divorce (Validity) Act, 1921 (Eng.).

[4] Matrimonial Causes (War Marriages) Act, 1944 (English).

[5] *Travers* v. *Holley*, (1953) Probate 246.

[6] *Indyka* v. *Indyka*, (1969) 1 A. C. 33 (H. L.).

Amendment of 1973 relating to domicile.

10.13 In 1973, the U.K. Parliament[1] passed legislation dealing with various aspects relevant to domicile and matrimonial proceedings. For the purposes of the present discussion, it is enough to mention that (i) section 1 of the Act of 1973 empowered the wife to acquire a domicile of her own, thereby amending the general rule, and (ii) in view of this amendment of the general rule as to domicile, it became necessary to revise section 6 of the Act of 1971, relating to recognition of foreign divorces. The amendments are consequential, and need not be gone into in this rapid survey.

Section 7 of the Act of 1971—Re-marriage.

10.14. Various systems of law impose prohibitions against re-marriage after divorce. These prohibitions may affect both parties equally, or may affect only one party. They may last for a limited time, or indefinitely. We are not, at the moment, concerned with prohibitions of a limited character. But we are concerned with the general prohibition against re-marriage which arises from the fact that there is no valid divorce according to the law of the country of nationality. This question usually arises where the parties are divorced by the court of country X, and now wish to re-marry in country Y, but the law of the country of nationality—country Z does not recognise divorce at all. They are no longer husband and wife, so far as country X is concerned, but they still cannot re-marry, and their previous marriage is regarded as subsisting in country Z under the law of their nationality because, according to the rules of that law, the decree does not dissolve the bond between the two spouses. Such a situation, in fact, arose in an English case.[2] Usually, it arises where the law of the country of nationality does not recognise divorce at all and that law is pleaded as a bar.

To deal with such a situation, section 7 of the English Act of 1971 (as amended in 1973), provides—

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

The section follows the Convention, which has an article substantially similar.[3]

Though the section is a bit abstract in its terms, what is intended thereby is that the non-recognition of divorce by a *third* country is no bar to re-marriage.

Section 8 of English Act—Exceptions from recognition—No subsisting marriage.

10.15. In certain circumstances, recognition of a decree of divorce or legal separation would not be desirable. The need for making an exception in respect of recognition may, for example, arise where, according to the law of the forum in which the recognition is sought, there was no subsisting marriage between the parties. It is obvious that if there was no—pre-existing marriage according to the legal system of the country where recognition of the divorce is sought, the courts of that country cannot recognise a divorce in respect of such marriage, because, to recognise the divorce or legal separation in such cases would amount to an implicit recognition of the marriage. A rule forbidding recognition in

[1]Domicile and Matrimonial Proceedings Act, 1973 (Eng.).

[2]*R. v. Brentwood Superintendent Registrar of Marriages* (1968) 3 All E. R. 279 commented upon by Chesterman in 32 Modern Law Review 84.

[3]Article 11, para. 9.14, *supra*.

such cases may, in a sense, be treated as stating the obvious. But, it is equally obvious that when the law on the subject of recognition is being given statutory form, a provision should be inserted to ensure that the courts of the country would not recognise a divorce or legal separation if, under the law of the country—which will include such rules of private international law as are applied in that country—there was no marriage in existence.

Natural justice.

10.16. While the above situation is a technical one, there may be other reasons for refusing recognition. An important category is constituted by circumstances showing that the foreign court granted the divorce or legal separation in violation of the rules of natural justice.

Public policy.

10.17. Finally, apart from the two situations referred to above, the courts of a country should have jurisdiction to refuse recognition where the divorce or legal separation is inconsistent with its public policy.

Three situations dealt with

10.18. These three situations[1] have been dealt with in section 8 of the English Act. It reads—

"Exceptions from recognition

8. (1) The validity of—

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

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

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

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

(a) it was obtained by one spouse—

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

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

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

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

[1]Para. 10.16 and 10.17, *supra*.

10.19. Section 8 of the English Act, thus, states three exceptions to recognition, viz:—

(i) Where there was no subsisting marriage to be dissolved, etc.;

(ii) infringement of natural justice;

(iii) manifest clash with public policy.

These are stated to be the only grounds for withholding recognition.

No subsisting marriage.

10.20. The first exception is self-explanatory,[1] and has been already dealt with.

Natural justice.

10.21. As to the second exception, it is recognised that circumstances may justify a foreign court in dispensing with service or in substituting service[2]. *Prima facie,* if the respondent can prove that he has had no notice, then the decree is not entitled to recognition.

But it will be recognised if—

(i) the foreign court has held that its rules of service have been duly complied with,[3]

(ii) those rules themselves are not contrary to natural justice;[4] and

(iii) the lack of notice is not consequent upon the petitioner's fraud.[5 6 7]

However, recent dicta, confirmed in *Hornett* v. *Hornett*[8], suggest that the respondent may be held to have waived his right to attack the validity of a decree,—in this case by "himself petitioning for the recognition of the decree",—but presumably also by marrying again.

All the circumstances to be considered.

10.22. In considering the materiality or otherwise of notices, all the circumstances have to be considered. In the case of a repudiation. or other unilateral divorce, notice is irrelevant, since notice would not enable the respondent to contest the divorce.[9]

Manifestly be contrary to public policy.

10.23. The last exception—the head of "public policy"—is justified by article 10 of the Hague Convention. The word 'manifestly' in the English section has been criticised as adding nothing.[10] In fact, there was a move to delete the word 'manifestly' at the committee stage of the House of Commons, but it was negatived. Since *ordre public* bulks larger in continental law than "public policy" does in English law, Article 10 of the Convention was, trying to restrict a too liberal application of *order public.* The Solicitor General stated[11] in the House of Lords: "The expression (manifestly) makes the horse (public policy) a trifle less unruly ..... The word 'manifest' is intended to imply a degree of inherent *strength in the horse.*"

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[1]Para. 10.15, *supra.*

[2]See *Macalpine* v. *Macalpine,* (1958) Probate 35, 45.

[3]See, e.g., *Igra* v. *Igra.* (1951) Probate 404; *Hornett* v. *Hornett,* (1971) 1 All E. R. 98.

[4]*Macalpine* v. *Macalpine,* (1958) Probate 35, 45.

[5]*Middleton* v. *Middleton,* (1967) Probate 62.

[6]*Hornett* v. *Hornett,* (1971) 1 All E. R. 98.

[7]As to fraud, see Chapter 17, *infra.*

[8]*Hornett* v. *Hornett,* (1971) 1 All E. R. 98, 102.

[9]*Maher* v. *Maher,* (1951) Probate 342, 344-345.

[10]See H. L. Vol. 816, Cols. 1552-1555, 1557.

[11]H. L. Debates, Vol. 816, col. 1553 (Solicitor-General).

10.24. As to the circumstances where recognition would be contrary to distinctive English public policy, no definitive list can be compiled. *Macalpine*[1] illustrates one application of public policy.

In re Meyer,[2] was a case of duress. An 'Aryan' wife of a German Jew had been forced to obtain a decree of divorce against her will. She petitioned to the court for a declaration that the divorce was invalid. The court held the decree to be vitiated by duress,—a concept which has been developed in relation to marriage.[3]

Section 8(2) (b)—Public Policy.

10.25. Under section 8(2)(b), already referred to[4], recognition of the validity of a divorce or legal separation may be refused if "it is manifestly contrary to public policy." Two comments are in order with reference to this clause. In the first place, there is no definition of "public policy", and the power thereby conferred is certainly wide. However, the word "manifestly" cautions the Court against interfering unduly. It is also to be noted, that article 10 of the Hague Convention provides that "contracting states may refuse to recognise a divorce or legal separation if such recognition is manifestly incompatible with their public policy (order public) ....." Such a clause is found in many of the international conventions on the subject of private law; for example,—Convention on Alimentary Obligations (15th April, 1958, article 2), Convention on Adoption (15th November, 1965, article 15) and so on. But it should be pointed out that the expression "order public" refers rather to the continental concept of *ordre* public than to the common law concept of public policy. The width of the continental concept, mentioned in the convention, is somewhat narrowed down by article 6 of that Convention which, *inter alia*, provides that the State in which recognition is sought, shall not review the merits of the decision, subject to the provisions of article 10. In the English section (section 8), on the other hand, only the expression "public policy" is used.

Fraud.

10.26. The other point to be noted with reference to section 8(2)(b) of the English Act is that it is silent on the question of fraud,—except that fraud could fall wihin 'public policy'. We are of the view that it is desirable that it should be specifically dealt with. It may be mentioned that fraud is specifically mentioned in section 13 of the Code of Civil Procedure, 1908. We may also state that it figures in the Supreme ourt case.[5] We shall revert to this topic later.[6]

Incidental order.

10.27. Under section 8(3) of the English Act, certain incidental orders are not recognised.

VI. MISCELLANEOUS

Section 9—10 of the English Act.

10.28. Section 9 and section 10(1) and section 10(2) of the English Act are not material for our purposes.

Section 10(3) of that Act defines "country" as follows—

"(3) In this Act, "country" includes a colony or other dependent territory of the United Kingdom, but, for the purposes of this Act, a person shall be treated as a national of such a territory only if it has a

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[1] *Macalpine* v. *Macalpine*, (1958) Probate 35.

[2] *Re* Meyer, (1971) 2 W.L.R. 401.

[3] See *Szechter* v. *Szechter*, (1970) 3 All E. R. 905.

[4] Para. 10.23, *supra*.

[5] Para. 1.1, *supra*.

[6] See Chapter relating to fraud, *infra*, (Chapter 18).

law of citizenship or nationality separate from that of the United Kingdom and he is a citizen or national of that territory under that law."

Section 10(4) of the English Act reads—

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

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

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

This, in short, is a brief survey of the Act.

CHAPTER 11

ENGLISH LAW AS TO JURISDICTION AND THE ACT OF 1972

Scope of the Chapter.

11.1. We shall now deal very briefly with the English law as to jurisdiction in regard to dissolution of marriage. The subject has an interesting history. The following stages of evolution of the law on the subject are discernible:

(1) The era before *Le Mesurier* i.e., before 1895.

(2) The doctrine of *Le Mesurier.*

(3) Statutory development after *Le Mesurier.*

(4) The Act of 1973—The Domicile and Matrimonial Proceedings Act, 1973.

The era before *Le Mesurier.*

11.2. English Courts were not given authority to entertain divorce cases until 1857.[1] The ecclesiastical courts had, in general, given only separation from bed and broad Jurisdiction in ecclesiastical courts depended on residence, not on domicile[2], and Parliament, when it granted divorces by a private Act, granted divorces without regard to the petitioner's domicile[3].

When exercising matrimonial jurisdiction under the Matrimonial Causes Act, 1857, English Courts did not, in the beginning, definitively adopt the

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[1]Matrimonial Causes Act, 1857 (20 and 21 Vict. c. 85).

[2]*Wall* v. *Wall,* (1949) 2 All E. R. 927, 928 (Pearce J.).

[3]See—

(a) Graveson, "Judicial Interpretation of Divorce Jurisdiction in the Conflict of Law." (1954) 17 Mod. L. Rev. 501;

(b) Griswold, "Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study," (1951) 65 Harf. L. Rev. 193;

(c) Note, (1945) 22 Brit, Y. B. Int'l Law 264.

domicile rule. That rule came to be adopted later in 1895, in *Le Mesurier*[1]. Prior to *Le Mesurier*, there apparently prevailed the "contractual theory", limiting jurisdiction to the courts of the country of marriage[2].

Cresswell, L. J. observed in *Forster* v. *Froster*[3]:

> "I should have been very glad indeed if the legislature had said that the court had no jurisdiction except over persons *domiciled in England*. When Lord Cambell was Lord Chancellor, I asked him to bring in a bill to settle the question and to define my jurisdiction; but he said, 'I cannot do it. Whenever that question is raised, it must be decided upon legal principles. It cannot be defined'."

The doctrine of *Le Mesurier*.

11.3. After some vacilation, however, the doctrine of domicile was firmly established. In 1895, the Judicial Committee of the Privy Council, in *Le Mesurier* v. *Le Mesurier*,[4] on appeal from Ceylon reviewed the English and Scottish cases, and came to the conclusion that according to international law, the domicile for the time being of the married pair afforded the only true test of jurisdiction to dissolve their marriage.

Ever since *Le Mesurier* v. *Le Mesulier*[5], English Courts have construed the general words in a statute conferring jurisdiction to dissolve valid marriages, as limited to marriages the parties to which are domiciled in England[6-7-8].

The case of Niboyet.

11.4. Neither the Matrimonial Causes Act, 1857, nor the Supreme Court of Judicature Act, 1873, contained any express provision limiting the jurisdiction of the court to decree dissolution of marriage by reference *to the domicile of the spouses* to the suit. That is the reason why, initially, there was some uncertainty and even judicial uneasiness as to the position in this regard. This is illustrated by *Niboyet* v. *Niboyet*[9] in which the Court of Appeal applied, but analogy to the new jurisdiction to grant dissolution, the rule applicable to the former jurisdiction exercised by the ecclesiastical courts in cases of nullity—the rule based on residence. This is an application of the general rule of construction of statutes that, in the absence of clear words to the contrary, they should be construed so as not to conflict with public international law, or with comity in the sense of generally recognised rules of private international law.

Domicile test traced to American law.

11.5. The test of domicile as a basis for jurisdiction was thus adopted in 1895, in *Le Mesurier*, and it has been stated[10] that this was done mainly in reliance on Aelican law. It has been pointed out[10] that in *Le Mesurier* v. *Le Mesurier*[1] the Privy Council in holding that jurisdiction to dissolve a marriage was con-

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[1]*Le Mesurier* v. *Le Mesurier*, (1895) A. C. 517 (P. C.).

[2]Dicay, Conflict of Laws (7th ed. 1958), page 290.

[3]*Forster* v. *Forster*, (1862) 3 Sw. & Tr. 144, 155.

[4]*Le Mesurier* v. *Le Mesurier*, (1895) A. C. 517 (P. C.).

[5]*Le Muesurier* v. *Le Mesurier*, (1895-99) All E. R. 836; (1895) A. C. 517.

[6]*A. C. for Alberta* v. *Cock*, (1926) All E. R. 525; (1926), A. C. 444

[7]*H.* v. *H.*, (1928) Probate 206.

[8]*Herd* v. *Herd*, (1936) 2 All E. R. 1516; (1936) Probate 205.

[9]*Niboyet* v. *Niboyet*, (1878) 4 P. D. 1.

[10]Ehrenzweigh, Conflict of Laws, (1962), page 235.

fined to the courts of domicile, elied on *Shaw* v. *Gould*[1], which, in turn, relied on Story's Commentaries. The test of domicile as the exclusive basis for jurisdiction to dissolve a marriage was firmly established under the doctrine of *Le Mesurier*. For this purpose, the wife's domicile is the same as that of the husband. She could not, in general, have a separate domicile.

Developments after *Le Mesurier* —Act of 1937— Deserted wives.

11.6. The rule relating to the wife's domicile,—i.e., that she could have no separate domicile—caused hardship. The Matrimonial Causes Act, 1937 (Sir Alan Herbert's Act), removed some element of hardship in the case of English wives who were—(a) deserted by their husbands who thereupon acquired a foreign domicile, or (b) deprived of their remedies in divorce in England by their husbands being deported; in either case instead of having to proceed in the court of the husband's *new domicile*, the wife could, under the Act of 1937, resort to the English Court, if the husband was domiciled in England.

A change was[2] made in the basis of jurisdiction in divorce at the instance of deserted wives who had grounds for dissolution of marriage but whose husbands were domicile abroad[3]. Such wives could, under the Act of 1949, sue[4] for divorce in England if they were resident in England and had been *ordinarily resident in England*[5], for a period of three years immediately preceding the commencement of the proceedings.

This provision was re-enacted in section 18 of the Matrimonial Causes Act, 1950, section 40 of the Act of 1965 and in subsequent re-enactments thereof. There was imported into this section "a somewhat unusual statutory provison"[6], namely, that in the exercise of this special form of jurisdiction, "the issues shall be determined in accordance with the law which would be applicable at the time of the desertion or deportation".

This provision of the Act of 1937 was, in substance, re-enacted in later revisions of the law.

Act of 1944—War marriages

11.7. The anomalous position of a wife was rendered more acute owing to the marriage of so many English-women to members of the Commonwealth and Allied forces stationed in England, during the second world war,-men *who never were domicled in England*[3]. Ths led to the passage, in 1944, of the Matrimonial Causes (War Marriages) Act, which gave another concession. It rendered it possible, subject to certain safeguards, for the English wives of such men to have recourse to the Divorce Court in England, notwithstanding that their husbands were domiciled abroad. It should, however, be noted that this concession applies only to marriages between September, 1939 and June, 1950.

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[1]*Shaw* v. *Gould*, (1868), L. R. 3 H. L. 55, 85.

[2]Para. 11:5, *supra*.

[3]Mr. Commissioner Latey, Q. C. "Divorce and Nullity" (1955) 40 Transactions of the Grotius Society 111, 112, 113.

[4]Section 1(1) (a), Law Reform (Miscellaneous Provisions) Act, 1949.

[5]As to the expression "ordinarily resident", see *Hopkins* v. *Hopkins*, (1951) Probate 116; (1951) 2 All E. R. 1035.

[6]Mr. Commissioner Latey, Q. C. "Divorce and Nullity" (1955) 40 Transactions of the Grotius Society 111, 113.

Position before 1973—summed up.

11.8. & 11.9. The above position continued, in substance, until 1973. The position before 1973 can be conveniently described in the words of a widely used work[1] on the subject—

> "English courts have jurisdiction to entertain proceedings for the dissolution of a marriage and the pronouncement of a decree of divorce in the following circumstances, the first of which applies to a petition presented by either husband or wife and the others to a petition only by a wife:
>
> 1. If both parties to the marriage are domiciled in England at the time of the commencement of the proceeding [*Leon* (1967)][2]
>
> 2. If a wife has been deserted by her husband, or a husband has been deported from the United Kingdom, and he was immediately before his desertion or deportation domiciled in England [Act of 1965, s. 49(1)].
>
> 3. If a wife is and has been ordinarily resident[3] in England for a period of three years immediately preceding the commencement of proceedings, and her husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.
>
> "The last two events conferring jurisdiction are exceptions to the general principle that divorce jurisdiction is based on domicile and were introduced to alleviate the hardship of wifes who otherwise in these circumstances would have been compelled to institute proceedings for divorce abroad due to the rule that a wife's domicile is always the same as her husband's.
>
> "Neither the nationality of either of the parties nor the place where a marriage was celebrated is of any relevance to jurisdiction."

Act of 1973.

11.9. In 1973, the Domicile and Matrimonial Proceedings Act[4] was passed in England, and the Act made substantial modifications in the above position. We need not recite all its provisions. For our purposes, it is enough to state that it made two important amendments relevant to jurisdiction—(i) The wife can now acquire separate domicile; (ii) English courts can exercise divorce jurisdiction on the ground of "habitual residence" also, besides the general ground of domicile.

Secion 5(2) of the Act of 1973 is important, and reads—

> "**Section 5(2).**—The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if *(and only if) either of the parties* to the marriage—
>
> (a) *is domiciled in England and Wales on the date when the proceedings are begun: or*
>
> (b) *was habitually resident in England and Wales throughout the period of one year ending with that date.*"

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[1] Judge Grant, Family Law (1970), page 110.

[2] *Leon* v. *Leon*, (1967) Probate 275 (Wife need not have residence).

[3] A wife is ordinarily resident in England if she has her real home there. The three years' period must be continuous, but, for example, holidays abroad do not interrupt it [*Stransky* v. *Stransky* (1954)]

[4] The Domicile and Matrimonial Proceedings Act, 1973.

(*Chapter* 11.—*English Law as to Jurisdiction and the Act of* 1973. *Chapter* 12.—*Reciprocity.*)

Old grounds abolished.

11.10. Other jurisdictional grounds for divorce are abolished by the Act—that being the effect of the words "only if" in section 5(2), quoted above.

A wife will no longer be able to petition for divorce on the basis,—(i) that she had been deserted or her husband deported and he was domiciled in England and Wales immediately prior to such acts[1], or (ii) on the ground that she is, and she has been for three years, ordinarily resident in England and Wales and her husband is not domiciled in any other part of the British Isles[2].

CHAPTER 12

Reciprocity

I. INTRODUCTORY

Introductory.

12.1. If legislation as to recognition is needed, the most important question is, what should be its basis. In this Chapter, we propose to consider the question whether, in relation to the grounds of recognition[3], it is necessary that the recognition of a divorce or separation on a particular basis should be provided for only where the foreign country concerned itself recognises Indian decrees of divorce or separation granted on that basis.

II. RECIPROCITY—FIRST MEANING

Two senses of the expression of 'reciprocity'.

12.2. This naturally brings to the forefront the aspect of "reciprocity". Now, we would like to make it clear that the expression 'reciprocity' could be used in two senses. In the first sense, it means that the same criteria of recognition should, as far as possible, be adopted, by our law in relation to the recognition of foreign decrees in matrimonial causes, as are laid down by law in respect of the exercise of *matrimonial jurisdiction* by our own courts. This aspect is better described as the theory of "equivalence"[4]. Reciprocity, in this sense, is not concerned with the test adopted by foreign courts in *recognising* our decrees, but with the test adopted by *Indian courts* in exercising *their own* jurisdiction[5]. This aspect, that is, the aspect of equivalence as explained above, is certainly relevant to the subject of recognition as a whole[6]. Our own view on the subject is that reciprocity in this sense can be legitimately taken into consideration.

Dean Griswold's view.

12.3. This approach was adopted in, and is illustrated by, the English case of *Travers* v. *Holley*[7]. Even before that decision, the approach had its supporters—e.g. Dean Griswold.[8-9]

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[1]Para. 11:4, *supra.*

[2]Para. 11:6, *supra.*

[3]Chapters 10-11, *supra.*

[4]*Cf.* Von Mehren and Trautman (1968), "Recognition of Foreign Divorces" in 81 Harv. Law Review, 1600.

[5]See para, 6:4, *supra.*

[6]See also Chapter 1, *supra.*

[7]*Travers* v. *Holley,* (1953) 2 All E. R. 794.

[8]Griswold, "Recognition of Foreign Divorces" (1952) 65 Harv. Law Rev. 193, 227.

[9]For his later comment, see Griswold in (1954) 67 Harv. Law Review.

For example, if the decree of the foreign Court was one dissolving the marriage between parties domiciled in the foreign country, Indian courts should recognise the dissolution as effected by the decree, irrespective of the question whether or not, the foreign court would itself recognise a decree of divorce granted in India on the basis of domicile.

12.4. This aspect could be better described by using the term "equivalence", as already stated[1]. Ordinarily, it is undesirable that recognition should be denied where the forum in which recognition is sought, itself employs a jurisdictional basis *equivalent* to that employed by the rendering court. The word "equivalence" is convenient in this context to connote this aspect.

Justification.

12.5. In this sense, the principles on which our courts *exercise jurisdiction*, and the principles on which our courts *recognise jurisdiction* exercised by a foreign court, should, in justice, tally with each other, wherever practicable,—although it is not necessarily implied that at a particular moment of time the two should be identical in all respects with each other. One need not over-simplify the problem by assuming that the two policies—the policy underlying the standards for assuming jurisding and the policy underlying the standards for recognition—are identical. The policies that underlie the choice of standards for assuming jurisdiction, however, do furnish a useful starting point for recognition also.

English practice.

12.6. One writer has pointed out[2] that many British states now claim jurisdiction and purport to exercise it on substantially wider grounds than the territorialist concepts embodied in the international jurisdictional rules which are basis of the enforcement and recognition of foreign judgments at common law. It was, thus, not unnatural that some attempts were made to enforce and recognise foreign judgments rendered by courts which though not internationally competent, had, purported to exercise a jurisdiction basis which corresponded to a ground which the forum claimed. Such an extension was made in the area of recognition of foreign divorce decrees[3].

III. RECIPROCITY—SECOND MEANING

Reciprocity in the second sense.

12.7. We shall now come to reciprocity in the second sense.[1] We are not in favour of adopting that as a basis, but we may state that theoretically reciprocity in the second sense means that the ground of *recognition* by our courts and the grounds of *recognition* by foreign courts, should be identical, or, in other words, our law should not compel our courts to recognise a foreign decree granted on a particular jurisdictional basis, if that particular basis is not adopted by the foreign law *as a test of recognition* in relation to the decrees of our courts.

Though reciprocity, in this sense, is familiar in many field of law[4], we are of the view that it should not be insisted upon in the context of decrees of divorce or legal separation. It should not be overlooked that private

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[1]Para. 12:2, *supra.*

[2]Pryles "Recognition of Foreign Judgment" in (1972) 12 I. J. I. L. 30, 31, 36.

[3](a) *Travers* v. *Holley*, (1953) Probate 346;

(b) *Re Mropcines Ltt.*, (1960) 1, W. L. R. 1973.

[4]E.g. section 44A, Code of Civil Procedure, 1908.

citizens are helpless individuals, and to make the recognition of matters affecting their *status* dependent on the course adopted by the authorities of a foreign country would lead to injustice.

The very object of the law relating to recognition, in the present context, is to "preclude the scandal which arises when a man and women are held to be husband and wife in one country and strangers in another."[1] There could be other objections to pursuing this object too zealously, and there could be need for imposing various safeguards and conditions, but reciprocity is not one of them. We think that on principle there is no rational justification for insisting on reciprocity in the second sense. However, we shall briefly discuss the views prevailing on the subject.

Reciprocity in the U.S.A. and Germany.

12.8. It would be convenient to begin with the position in the U.S.A., since the doctrine seems to have found some favour there. In the U.S.A. the doctrine that recognition will be denied unless the rendering jurisdiction would recognise an analogous judgment by the requested forum, was announced by the Supreme Court of the U.S.A. in *Hilton* v. *Guyot*[2], which based its decision "upon the broad ground that international law is founded upon mutuality and reciprocity." Four justices, however, dissented, stating that *res judicata* doctrine should apply "on the same general ground of public policy that there should be an end of litigation", and that "it is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary."

In that case, the lower court had enforced a French money judgment passed in France against a U.S. citizen. The majority opinion held that:

> "The comity of our nations does not require us to give conclusive effect to the judgments of the courts of France;" and this was "in view of want of reciprocity on the part of France, as to the effect to be given to the judgment, of this and other foreign countries."
>
> The same rule seems to be adopted in German law for most classes of cases[3].

Criticism in U.S.A.

12.9. In both countries (U.S.A. and Germany), however, there is considerable disagreement in academic circles about the extent of the rule[4].

Scholars in the U.S.A. in general oppose such a requirement, because—(i) it arbitrarily penalizes private individuals for positions taken by foreign governments, and because (ii) such a rule has little, if any, constructive effect, but tends, instead, to a general breakdown of recognition practice[5].

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[1] *Wilson* v. *Wilson* Law Reports 2 Probate 435, 442.

[2] *Hilton* v. *Guyot*, (1895) 159 U. S. 113, 228, 229, 234.

[3] See Von Mehren and Trautman "Recognition of Foreign Divorce" (1968) Harv. Law Rev. 1600, 1660, 1661.

[4] *See:*

(a) Reese, "The Status in This Country of Judgments Rendered Abroad", (1950) 50 Column. L. Rev. 783, 792 (rule applies only when the American party was the defendant abroad, and lost);

(b) Nadelmann, "Non-Recognition of American Money Judgments Abroad and What To Do About It", (1957) 42 Iowa L. Rev. 236, 249-55.

[5] (a) See, e.g., Ehrenzweig, Conflict of Laws (1952) page 46, 166;

(b) Nadelmann, "Reprisals Against American Judgments" (1952) 65 Harv. L. Rev. 1184, 1185-91;

(c) Goodrich, Conflict of Laws, page 392.

(*Chapter* 12.—*Reciprocity.* *Chapter* 13.—*Recommendations as to existing grounds for Recognition.*)

Doctrine not adopted in some States in U.S.A.

12.10. In any case, the doctrine has not been followed in several American jurisdictions notably, New York[1], Georgia[2]-[3] and California[4]. Moreover, it is important to point out that even where it is followed, it is not applied to judgments *in rem*.

Position in England, France.

12.11. It may also be stated that no reciprocity requirement is imposed in relation to the recognition of foreign divorces by—

(a) England[5], or

(b) France[6].

Even before the law was placed on a statutory footing by the English Act of 1971, the House of Lords, in the case of *Indyka*[7], stated that "considerations of policy" rather than the principle of "reciprocity" were relevant in this regard.

Conclusion.

12.12. Having considered all aspects of the matter, we have come to the conclusion that reciprocity in the second sense[8] should not be insisted upon in the present context. We are, accordingly, making our recommendations without any restriction or qualification in this regard, and our recommendations should apply whether the foreign country does or does not recognise our decrees on jurisdictional bases similar to those proposed in the law recommended by us.

CHAPTER 13

RECOMMENDATIONS AS TO EXISTING GROUNDS FOR RECOGNITION

Introductory.

13.1. We shall now deal with certain topics which concern some of the existing grounds of recognition or other miscellaneous matters, namely,—

(a) divorce or legal separation granted in the country of domicile;

(b) divorce or legal separation recognised as valid in the country of domicile;

(c) non-recognition of divorce by third country not *to be a bar to divorce*.

Divorce granted in country of domicile.

13.2. Divorce granted in the country of domicile is recognised in India, since we follow the common law rules. The question whether this rule should be

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[1](a) *Johnston* v. *Compaigne Generale Transatlantique*, (1926) 242 N. Y. page 331, 152 N. S. 121 cited by Von Mehren and Trautman, "Recognition etc." (1968) 81 Harv. Law Rev. 1600, 1660, 1661;

(b) *Cowans* v. *Ticonderoge Pulp & Paper Co.*, (1927) 219 App. Div. 120, 219 N. Y. Supp. 284, Aff'd 246 N. Y. 603, 159 N. E. 669.

[2](a) *Truscon Steel Co. Ltd.* v. *Bieglar*, (1948) N. E., 2d., 623;

(b) *Goulborn* v. *Joseph*, (1943) 195 Ga. 723, 25 S. E. 2d. 576.

[3]See Pryles, "Recognition of foreign judgments etc." (1972) 12 I. J. I. L. 30, 31.

[4]Ehrenzweig, Conflict of laws (1962), page 165, para. 46, and page 163, footnote 25.

[5]English Act of 1971.

[6]Nadelmann "Recognition of Foreign Money Judgments in France", (1956) 5 Am. J. Comp. L. 248, 251.

[7]*Indyka* v. *Indyka*, (1967) All E. R. at page 689.

[8]Para. 12:2, *supra*.

codified, is a question of detail. But the principle is as stated above. It may also be stated that Indian Courts have themselves been exercising their jurisdiction in matrimonial causes on the principle of domicile. Moreover, some of our statutory provisions are also based on the assumption that the country of domicile has this jurisdiction. Accordingly, it is proper that we need not disturb the present position.

Recognition as valid in the country of domicile.

13.3. Where the divorce or legal separation, though not granted in the country of domicile, is recognised as valid in the country of domicile, it stands to reason that it should be recognised in India. Such a provision is contained in the English Act of 1971[1], and the matter should be expressly provided for.

Recognition by virtue of any other enactment.

13.4. Besides this, it is also necessary to save the provisions of any other *enactment*, which provides for recognition[2]. There is, so far as could be ascertained, only one Indian enactment[3] directly relating to the recognition of decrees of divorce. But the provision as regards recognition by virtue of any other enactment will have to be general.

Non-recognition by a third country not a bar to divorce.

13.5. Lastly, it appears to be advisable to provide that the non-recognition of a divorce by a third country shall not be a bar to the recognition of the divorce in India. Such a provision is contained in the English Act[4]. The main utility of such a provision lies in this, that it makes the provisions of the proposed Act operative irrespective of the attitudes of other countries—particularly, countries which adopt other tests for recognising divorces.

CHAPTER 14

RECOMMENDATIONS AS TO NEW GROUNDS OF RECOGNITION

I. INTRODUCTORY

Introductory.

14.1. Having dealt with the existing law, we shall now proceed to consider what changes should be made in it. The first major topic, which we propose to discuss in this Chapter, will be concerned with the addition of new grounds of recognition. Retention of the existing grounds has been already dealt with[5].

Need for addition to the existing grounds—concepts of domicile.

14.2. The question may naturally be raised, at the outset, why any additional grounds of recognition should be inserted, and whether the existing grounds of recognition, which are mostly based on the central concept of domicile, are not sufficient for practical purposes. In order to deal with this question, it is necessary to refer to certain drawbacks resulting from the concept of domicile, and also to take note of certain other aspects relevant to the matter.

II. DOMICILE—DEFECTS

Drawbacks in the concept of domicile.

14.3. Now, so far as the concept of domicile is concerned, though, by and large, its outlines in theory are clear, its practical application leads to certain difficulties, the most important of which is the difficulty of determining that part of the concept which represents the mental element. Broadly speaking, domicile, as understood according to the traditional concepts of the common

[1]Section 6(a), English Act of 1971.

[2]*Cf.* section 6(b), English Act of 1971.

[3]Enactment relating to war marriages.

[4]*Cf.* section 7, English Act of 1971.

[5]Chapter 13, *supra.*

law world, comprises two elements, which can be conveniently described as the physical element and the mental element. Case-law on the subject is legion; but, for the purposes of the present analysis, it is sufficient to refer to the observations of Lord Wensleydale[1]: "There are several definitions of domicile which appear to me pretty nearly to approach correctness. One very good definition is this: habitation in a place with the intention of remaining there for ever, unless some circumstances should occur to alter this intention."

The combination of fact and intention, which is required to constitute domicile, is also indicated lucidly in the observations of Russell, J.[2]—

> "The domicile flows from the combination of fact and intention, the fact of residence and the intention of remaining for an unlimited time. The intention required is not an intention specifically directed to a change of domicile, but an intention of residing in a country for an unlimited time".

Mental element.

14.4. The physical element in domicile may not present problems of magnitude. The mental element does. It may be easy to determine whether a person is or is not residing in a particular place at the time when the proceedings for divorce were instituted. But it is not so easy to determine what his intentions were at that particular moment. A person may not always have a very definite intention as to what country he proposes to make his permanent home. The inference drawn by the court may do injustice to the person who may not have such intention.

The mere fact of a man residing in a place different from that in which he has been previously domiciled (domicile of origin), even though his residence there may be long and continuous, does not, of necessity, show that he has elected that place as his permanent and abiding home. Therefore, though the concept of domicile as a test of recognition of a foreign decree is simple in formulation, it is difficult in its application.

Rigidity of the English concept.

14.5. Another difficulty created by the concept of domicile is the fact that it is a very rigid one. In *Arnold* v. *Arnold*[3], it was observed—

> "The general rule of jurisdiction in divorce in England is that English domicile only is the test and that has to be the domicile of the husband. Pausing there, English conception of domicile is the most rigid in the world. It must be residence with the intention of permanent settlement in that place."

It does not, for example, tally with the American concept of domicile, which, in this context is, to some extent, more liberal. The American concept of domicile is, in practice, if not in theory, different from the English one. The English concept emphasises the subjective element. While judicial pronouncements and other current formulations of the requisite intent in the U.S.A. do not look very different from those employed in English law, yet, in actual practice, American courts, in general, have not taken the subjective test as literally as their British counterparts.

Remote possibilities, or even rather strong probabilities, of a future return to the country of the previous domicile, or other removal from the actual place of abode would, by the yardstick applied by English courts, probably prevent

[1] *Whicker* v. *Hume* (1858) 7 House of Lords Cases 124, 164.

[2] *Re Annesley, Davidson* v. *Annesley*, (1926) Ch. 692.

[3] *Arnold* v. *Arnold*, (1957) 1 All E. R. 570, 572.

the acquisition of a domicile of choice. But these have usually been disregarded by American courts. This has been done even where the acquisition of a new domicile involved abandonment of a domicile of origin.

Again, in the U.S.A., a change of domicile is said to depend not so much upon the intention to remain indefinitely in the new place, as upon a lack of any *present intention* to establish a home elsewhere.

Under the Restatement prepared by the American Law Institute, for example, it is enough if the person intends to make a place as home "for the time at least."[1]

14.6. Another drawback of the English concept is that apart from statutory modification, the domicile of the wife follows that of the husband in general, so long as the marriage is subsisting. It is not only settled that a wife on her marriage acquire by *operation of law* the domicile of her husband, which she retains so long as the marriage subsists[2-3] but it is also well-settled that she retains this domicile even if she is deserted by her husband[4], and even though she may have obtained a decree of judicial separation[5]. Domicile of wife.

This aspect of the concept of domicile naturally causes *injustice* when the husband deserts the wfe, with the result that while the *de facto* residence of the wife is different from that of the husband, the pre-existing domicile, which arose by reason of the marriage, confers jurisdiction on, and only on, the courts of the foreign country where, before the desertion, the husband was domiciled. Until the marriage comes to an end, this position survives where the common law applies.

14.7. To sum up what has been stated above, the concept of domicile suffers from the following principal drawbacks, namely,— Difficulties of domicile summed up.

(i) difficulties of application[6];

(ii) rigidity of content[7]; and

(iii) injustice to the wife[8] in certain circumstances.

However, we may note that many countries adopt the test of domicile as a basis for exercising jurisdiction in divorce.

14.8. In relation to those countries, it will obviously be desirable to recognise the decrees of divorce or legal separation passed in these countries on that basis. Such a provision is contained[9] in the English Act of 1971 also, and its Domicile.

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[1]Restatement (Conflict of Laws), section 15(2)(b), section 18.

[2]*Alberta* v. *Cook*, (1926) A. C. 444 (P. C.).

[3]This is the common law rule.

[4]*Yelberton* v. *Yelberton*, (1859) 1 Sw. and Tr. 574.

[5]See discussion in *Garthwaite* v. *Garthwaite*, (1964) 2 All E. R. 233, 236 (Court of Appeal) (Wilmer, L. J.).

[6]Para. 14:4, *supra*.

[7]Para. 14:5, *supra*.

[8]Para. 14:6, *supra*.

[9]Section 3(2), English Act of 1971.

utility, even after insertion of the proposed new tests of recognition, lies in this, that Indian courts, while considering the question of recognition, will not be called upon to examine and investigate questions of fact relating to habitual residence or nationality—the proposed new tests.

We therefore recommend that the present position in this regard should be preserved.

Legislative device.

14.8A. The legislative device to be adopted in this connection should, however, be slightly different from that adopted in the English Act. The English Act includes domicile under habitual residence, in section 3(2). We would prefer to mention it separately, and thus adopt a more direct way of dealing with the matter.

III. HABITUAL RESIDENCE

Habitual residence as a ground of recognition.

14.9. In view of the drawbacks of domicile to which we have referred, it is desirable to consider the addition of other tests. The first ground of recognition to be newly added, to which we address ourselves, is that of habitual residence. Though the concept of *residence* is not known to the common law in this field, it is not unfamiliar to Indian legislation. Before certain judicial decisions[1] (commencing with the year 1921) changed the position, residence was treated as a basis for the exercise of jurisdiction under the Indian Divorce Act, 1869, section 2. It is believed that the concept of "habitual residence" strips the concept of "domicile" of technicalities and concentrates on the duration of the residence. In particular, it eliminates inquiries as to the *mental element.*

Definition of "habitual residence" not necessary.

14.10. Since the question whether residence is habitual will be a question depending on the facts of each case, a definition of "habitual residence" would not be necessary. The expression "habitual residence" does not, of course, necessarily mean the last *conjugal residence* in the country concerned, though, in many cases, the two might coincide.

Habitual residence of either spouse.

14.11. A more difficult question,—though a question of detail,—arises where the habitual residence of the respondent and the habitual residence of the petitioner differ. What should be the test adopted in this regard ? Habitual residence of the respondent creates no problems, because, if the country is one where the *respondent* was habitually residing, in most cases recognition of a decree of a court of that country would not cause any injustice to the *respondent.* However, the situation where only the *petitioner* was habitually resident in the foreign country, is a difficult one. It is sometimes believed that such a test of jurisdiction—a test connected with the petitioner's residence—might favour what is known as "—forum-shopping", that is to say, the petitioner going from one place to another and taking up residence in a country mainly in order to select a forum favourable to him.

Article 2 of the Convention.

14.12. It appears that at the Hague Conference on private international law, also, there was some reluctance to admit habitual residence of the petitioner as a ground of jurisdiction. But the delegates of the Scandinavian countries—Denmark, Finland and Norway—insisted upon the inclusion of a forum based on the habitual residence of the petitioner. The conference ultimately admitted this as a ground of jurisdiction, though with certain safeguards,—briefly, at least one year's residence of the petitioner, the fact that the spouses last habitually resided together in the country, and the fact that the petitioner who also a national of that State.

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[1]See *Keyes* v. *Keyes, supra.*

The precise provision in the Convention[1] is elaborate. Article 2 is as follows:

"Article 2

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

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

(2) the petitioner had his habitual residence there and one of the following further conditions was fulfilled:

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

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

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

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

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

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

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

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

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

We shall discuss the question of either spouse later.

IV. NATIONALITY

Nationality constituted by a genuine link justifying duty of allegiance.

14.13. We shall now discuss the test of nationality. In general, and individual has the nationality of State which confers it upon him, provided there exists a genuine link between the State and the individual[2].

The requirement of a genuine link is the logical result of the decision of the International Court of Justice in the *Nottebohm case*[3]. The question of existence of a genuine link may present problems when the particular country attempts to confer nationality upon a person not resident within its borders without that person's consent. It may also happen that more than one State may determine that an individual is its national. For the present purpose it is not necessary to go into these details of nationality. But it is pertinent to

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[1]Article 2 of the Hague International Convention.

[2]American Law Institute, Restatement of Foreign relations Law, Second (1905), page 74, para. 26.

[3]*Nottebohm case*, 1 C. J. Report 4; 49 American Journal of International Law, 396.

point out that nationality is a concept which is normally evolved in order to determine whether a person owes *permanent allegiance* to the country concerned[1].

Use as to desirability of recognising the test of nationality.

14.14. Examining the desirability of the test of nationality in relation to recognition of divorces, we would state that on this subject, two views are possible. Many civil law countries treat this as a basic ground for the exercise of jurisdiction in matrimonial causes; and not to recognise this test amounts to non-recognition of their decrees in almost every case. At the same time, however, it is to be pointed out that nationality, in itself, does not indicate a sufficiently close connection significant for the present purpose between a person and a country.

Another ground of recognition is nationality.

14.15. Injustice might, therefore, result where a person has abandoned the country of nationality long before institution of the proceedings in which the decree was obtained. Recognising these aspects, the Hague convention[2] requires certain other safeguards to be complied with, where recognition on the ground of nationality is dealt with.

ept of natio-

14.16. Nationality has a political aspect, and may involve various methods, such as place of birth, formal allegiance to a sovereign, race or ancestry and many other facts which are not necessarily related to domicile. As Leflar has pointed out[3]. "It is entirely possible for a citizen of one country to be domiciled in another."

and ty.

14.17. The difference between nationality and domicile is of interest. In Roman times, the two ideas, (nationality and domicile), were not clearly separated. The relationship of a person to the laws of a community could be regarded—

(i) from the point of view of his *domestic* home being located within the community, or

(ii) from the point of view of political ties binding him in common with other members of the community.

Roman Law.

14.18. The Romans did not regard domicile as unitary, in the sense that a person could be domiciled in only one jurisdiction at a given time. The idea was introduced later[4]. An important factor causing certain countries to derive personal law from nationality, while causing other countries to derive it from domicile, has been the development of federalism[5].

Test of nationality discussed in the context of recognition by Indian courts.

14.19. The test of nationality may now be considered in the Indian context. It can be stated that the majority of the cases coming up before Indian courts for recognition, directly or indirectly, will of Indians who, before their return to India, were residing in foreign countries, such as the United Kingdom, some of the Far Eastern countries, the United States and Canada. As to such cases, the test of nationality, even if inserted as a ground for recognition of the foreign divorce, will be merely academic. The nationality of the parties, in the vast

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[1]*Cf.* The U. S. A. Immigration and Nationality Act, 1952, section 1101(a)(22), (1958); 8 United States Code, section 1101(a)(22).

[2]Article 2, para. 14:12, *supra.*

[3]Leflar, American Conflict Laws (1968), page 31, paragraph 16.

[4]See Story, Conflict of Laws (8th ed., 1883), Ch. 3.

[5]*Cf.* Cook. The Logical and Legal Bases of the Conflict of Laws (1942). Ch. 8.

majority of such cases, would be Indian, and the test of nationality would not add anything to the competence of the foreign courts.

However, in a small number of cases, where the parties are not Indian nationals, or at least one of the parties is not an Indian national, the acceptance or rejection of the test of nationality, in relation to recognising the jurisdiction of the foreign court, could be material. If the foreign country exercised jurisdiction on the basis of nationality and the parties, though of Indian origin, are its nationals, such a decree may be passed by the foreign court. Utility of recognition of the decree in such cases is obvious.

Points in favour of recognising on the ground of nationality—Position regarding Christians.

14.20. Adoption of the test of nationality has another consideration to commend itself, namely, that the test is applied by many of the civil law countries for exercising their matrimonial jurisdiction. It follows that if the test is not accepted and incorporated into our law for recognising the decrees of divorce granted by those countries, than divorces granted by those countries would not be valid in India. The parties would then have to institute proceedings for solution again in India. Assuming that this situation will not often arise in practice because of the small number of non-Indians[1] whose marriage, having been dissolved by a foreign court, would be the subject-matter of litigation in Indian courts, it is still to be borne in mind that if the situation arise, there will be practical inconvenience, because the question of divorce will have to be re-litigated.

In addition to this aspect of practical inconvenience, there is a theoretical aspect which cannot be brushed aside, namely, the parties, unless they are domiciled in India—may not even be able to invoke the jurisdiction of an Indian court, at least when they are Christians. This is for the reason that under the Indian Divorce Act, 1869, which is the principal enactment for Christians, jurisdiction[2] in relation to divorce is exercised exclusively on the basis of domicile. If this be the correct position, then it means that, non-domiciled Christians would neither have a foreign decree to stand back upon,—if it is not recognised,—nor can they seek the aid of our courts for establishing the ground of divorce (whatever that ground may be), and seeking appropriate matrimonial relief. Even if they are prepared to undergo the inconvenience of instituting fresh proceedings in India, the scheme of the Indian Divorce Act would come in their way if they are Christians, as explained above.

Difficulties of the situation where parties are Hindus.

14.21. Even where, in the above situation[3], the parties are Hindus, though not of Indian nationality, a similar difficulty could arise, because the provision[4] in the Hindu Marriage Act relating to the jurisdiction of courts is ambiguous.

It is not clear beyond doubt whether the provision is intended simply to deal with the internal venue, i.e., the particular Indian court that should exercise jurisdiction, or whether it is intended to deal with the broader question of the jurisdiction of Indian courts in general with reference to private international law.

Test of nationality recommended.

14.22. Having regard to the difficulties which would result if the decrees of the court of nationality are not recognised, we are inclined to take the view that such recognition should be accorded. If this principle is accepted, the next

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[1]See para 14:19, *supra*.

[2]See discussion as to section 2, Indian Divorce Act, 1869 (Chapter 6, *supra*).

[3]Paras. 14:19 and 14:20, *supra*.

[4]Section 19, Hindu Marriage Act, 1955 (See Chapter 5, *supra*).

question to be considered is one of detail, namely, whether the principle of nationality should be subjected to any such additional requirements as are contemplated by Article 2 of the Hague Convention[1] [2] or whether nationality *simpliciter* should be enough. In either case, another question of detail will also require to be considered, namely, whether the nationality of *both parties* should be the test, or whether the nationality of *one party* should suffice. We think that a simple test is enough.

14.23. We note that in England, this test has been adopted without any further qualifications[3]. On the other hand, in the International Convention[4], the test has been inserted with certain restrictive provisions. The former is preferable, in our view, as simpler to apply, and it does not suffer from any juristic infirmity.

Whether other considerations should be incorporated.

14.24. On the question whether the test of nationality should be encumbered with the various qualifications that are found in article 2 of the International Convention[5], we repeat our view[6] that it should not be so encumbered, for two reasons. In the first place, such restrictions are not recognised by some the civil law countries, and, in the second place, such restrictions might redu the practical utility of the provisions for recognition. In practice, this test is not likely to be invoked often in relation to persons of Indian origin, and will be mostly invoked in relation to persons of foreign origin. Such cases are not likely to be many.

IV. WHETHER BOTH PARTIES SHOULD SATISFY THE TEST.

Test of habitual residence etc. of either party, whether to be adopted.

14.25. We shall now discuss the question whether it is enough if the jurisdictional requirement is satisfied in respect of one of the spouses, or whether that requirement should be satisfied as regards both the spouses. This aspect has caused some concern to us, and has received our anxious consideration, since any decision we may take, would vitally affect the parties.

Difficulty of deciding the basis of recognition.

14.26. It may be noted, at the outset, that it is always a difficult question to decide whether a particular basis for recognition should be adopted in the wider form or in the narrower form. Against the desirability of recognising only divorces where the parties have a *real social connection* with the country of its own, there must be weighed the need to avoid situations where the parties are regarded as being married in one country and not married in another[7]. However, the difficulty is in the application of this broad principle. In what cases can we assert, without fear of serious contradiction, that there is a real social connection? This is a difficult question to answer, and there is a room for divergence of approach, as is illustrated by the course adopted in the English Act as contrasted with the course adopted in the Convention.

Under the English Act, it is enough if either spouse (i.e., one of the spouses), satisfies the prescribed[8] test. We have already noted this provision.

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[1]Para. 14:21, *supra.*

[2]Article 2.

[3]Section 3(1)(b) of the English Act of 1971.

[4]Article 2 of the Convention.

[5]Article 2, para. 14:21, *supra.*

[6]Para. 14:23, *supra.*

[7]Report of the Royal Commission on Marriage and Divorce (1956), Command Paper No. 9678, pages 12 and 13.

[8]Section 3(1) (a) (b) and section 3(2), 1971 Act, para. 10:3, *supra.*

Article 2, Hague Convention.

14.27. The Hague Convention[1] is more restrictive in this regard, and lays down a number of conditions to be fulfilled where both the parties do not satisfy the jurisdictional test. Article 2 of that Convention[2] makes a distinction between the respondent and the petitioner. The habitual residence of *the respondent* within the territory of the state of the divorce or separation is, by itself, a sufficient ground of jurisdiction, under Article 2(1). This is likely to be the most convenient forum from the respondent's point of view, and was therefore admitted, at the Convention, with little discussion. But there was more reluctance to admit the habitual residence of the *petitioner* as a ground of jurisdiction. Some delegates apprehended that such a head of jurisdiction might favour "forum-shopping". The delegates of the Scandinavian countries, however, having in mind the case of a Scandinavian woman deserted, say, by an Italian husband, insisted upon the inclusion of a forum based on the habitual residence of the petitioner—apparently to secure recognition for divorces granted to the deserted Scandinavian women in a Scandinavian country. In the result, the Conference admitted the petitioner's habitual residence in a state as a ground of recognition *but only when coupled* with such "fortifying" elements as the length of the petitioner's residence, the fact that the spouses last habitually resided together in that State, and the fact that the petitioner was also a national of that State.

It was argued by the Belgian delegate in 1967 that the fact that the spouses had their last conjugal residence in a State should, by itself, found the competence of that state in matters of divorce and separation, but this suggestion was ultimately rejected.

Question of nationality.

14.28. Some difficulty also arose, in the debates preceding the Convention, as to the admission of *nationality* as a ground of jurisdiction. Since nationality is the basic ground of jurisdiction in most civil law countries, there was no objection to applying it in general. It was argued, however, by certain delegates that the political tie of nationality did not always point to a sufficiently close connection between a person and a State, to justify, in relation to the person, its assumption of jurisdiction in divorce. It might lead, for example, to the application to a person, against his will, of the laws of a State which he had long abandoned This reasoning was so far accepted that the mere *nationality* of the *respondent* is never, by itself, a recognised head of jurisdiction[3] under the convention. Nationality of the *petitioner* suffices only when it is coupled with such "fortifying" elements as.—(1) the petitioner's own habitual residence within his national State, (2) his habitual residence there for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings, and (3) the respondent's also possessing the nationality of the State of the divorce.

The Convention makes yet another concession tc the nationality principle. Article 2(5) recognises that a petitioner may seek the remedy of divorce in the state of his nationality if (a) he *was present* in that State at the date of institution of proceedings and (b) the spouses *last habitually resided together* in a State whose law, at the date of institution of the proceedings, did not provide fot divorce.

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[1]Article 2, Hague Convention.

[2]Para. 9.3, *supra.*

[3]Its inclusion, though pressed by the delegates of Austria, Belgium, Germany, Greece and Yugoslavia, was rejected by a large majority of states.

This provision is designed to meet the case where, for example, a girl of Swiss nationality who is married to an Italian wishes to obtain in divorce in Switzerland without necessarily taking up or resuming an habitual residence there. Though this provision clearly opens the way to a species of "air ticket divorce" for the wealthy, the delegates of Italy and Ireland were among those who voted in its favour.

Our approach.

14.29. So much as regards the provision in the Convention. The question now to be considered is, what should be our approach? Should we adopt—(i) the English Act, (ii) the Convention, or (iii) any other course? Adoption of the English Act[1] would mean that the jurisdictional test need be satisfied only in relation to one party. Adopting the Convention[2] would mean that (i) both parties must satisfy the test, or (ii) if only one party satisfies the test, certain other requirements should also be satisfied.

Peculiar social fact relevant to Indian women with husband's resident abroad.

14.30. In making our recommendation on the subject, we cannot disregard the social fact that many Indian women in India marry young Indians who, soon after marriage, return to a foreign country where they have already taken up their residence, the wives remaining behind. The Indian husband may then obtain a divorce in the foreign country on the basis of, say, his own habitual residence in the foreign country. The wife may not have visited the foreign country, or may not have resided there for a long period.

If, in this hypothetical situation, a court in a foreign country grants, a divorce and the divorce is recognised in India, injustice would be caused to the wife, because, on the facts assumed in the above hypothesis, the wife cannot be presumed to have accepted the foreign country as her legal home.

Of course, the same reasoning applies where a husband returns to India, leaving the wife in the foreign country and the wife obtains a divorce in that country. But this situation is not likely to be as frequent as the situation mentioned above.

Recommendation as to habitual residence etc. of both parties.

14.31. Having regard to what we have stated above, we have, after careful consideration, come to the conclusion that in order that recognition may be granted by Indian law to a foreign divorce, the proposed law should require that *both the parties* should satisfy the jurisdictional tests. In coming to this conclusion, we have been chiefly impressed by the fact that if recognition is granted on the basis of the domicile, habtitual residence or nationality of *one of the parties,* injustice would often be caused to the woman, in the special circumstances already mentioned[3].

Revision in English Act or Hague Convention not favoured.

14.32. It follows from what we have stated above that we do not consider the provision in the English Act[4] as appropriate for India. We may also mention that we are not inclined to adopt the compromise formula adopted in article 2 of the Hague Convention[5]. Such a formula might prove rather cumbersome. That article is not a model of pristine simplicity. But, that apart, we are not certain if the formula given in that article will be easily workable in practice, hedged in, as it is, with a number of restrictions which might require the recognising court to satisfy itself about a number of tests.

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[1]Para. 14.26, *supra.*
[2]Para. 14:28, *supra.*
[3]Para. 14:30, *supra.*
[4]Para. 14:26, *supra.*
[5]Para. 14:28, *supra.*

Effect of the recommendation considered.

14.33. We would, therefore, prefer the stricter approach[1], namely, that both parties must satisfy the jurisdictional tests. No doubt, such an approach carries certain implications, since it lays down a narrow scope for recognition. If the husband is, say, habitually residence in country X, and his wife is habitually resident in country Y, a divorce obtained in neither country would be recognised in India. The same applies to cases where the parties are domiciled in, or nationals of, different countries.

14.34. However, this is the position even now under Indian private international law, which, following the English rules, requires the domicile of *both parties* in the foreign country, before the divorce is recognised. In any case, this aspect must be weighed against the possibility of serious injustice, particularly to the woman, as explained above[2], if the test of habitual residence etc. of *either party* is adopted.

V. RECOMMENDATION

Recommendation.

14.35. Having regard to all aspects of the matter, and after taking into account the various points discussed above, we have come to the conclusion that it is desirable to provide for the recognition of divorces or legal separations granted by countries where both were habitually resident, or by countries of which both are a national. In addition, the present test of domicile should be continued.

CHAPTER 15

DOMICILE AND NATIONALITY OF THE WIFE

1. DOMICILE

Dependent domicile of wife.

15.1. Two questions concerning married women may now be dealt with—domicile and nationality. A married woman's domicile follows, in general, that of her husband. This is described as the domicile of dependence. Domicile of dependance as a basis of jurisdiction has attracted much criticism over a long period, particularly in that it may be unfair to a married woman who can have no independent domicile.

Indian law.

15.2. It may be noted that so far as domicile is concerned Indian courts have, in general, followed the English rules whenever occasion arose,—as for example, in cases under the Indian Divorce Act. The Indian Succession Act[3] has a specific provision whereunder the domicile of the wife, in general, follows that of the husband—though, the applicability of this part of the succession Act is imited.[4] In this position, if the rule of English law is to be modified, an express provision appears to be desirable.

Criticism of theory of dependent domicile.

15.3. While the advantage of domicile is that it covers people who psychologically "belong" to a country, the theory of dependent domicile of a wife is the main disadvantage. This theory of dependant domicile violates the modern principle of equality of sexes, and has been discarded in many commonwealth countries, such as, Canada,[5] Australia[6] and New Zealand.[7]

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[1]Para. 14:31 and 14:32, *supra*.
[2]Para. 14:30, *supra*.
[3]Sections 15 and 16, Indian Succession Act, 1925.
[4]Section 4, Indian Succession Act, 1925.
[5]Divorce Act, 1968 (Canada).
[6](Australian) Matrimonial Causes Act, 1963.
[7]New Zealand Matrimonial Causes Act, 1963.

Abolition of the wife's dependant domicile has been achieved in England by section 1 of the Act[1] of 1971, which reads—

> "(*1*) (1) Subject to sub-section (2) below, the domicile of a married woman as at any time after the coming into force of this section shall, instead of being the same at her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile.
>
> (*2*) Where immediately before this section came into force a woman was married and then had her husband's domicile by dependence, she is to be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin) unless and until it is changed by acquisition or revival of another domicile either on or after the coming into force of this section.
>
> (*3*) This section extends to England and Wales, Scotland and Northern Ireland."

15.4. Some countries still apply the common law rule.

Recommendation as to wife's domicile.

15.5. In our view, it would be fair to provide that for the purposes of the present proposals, the domicile of the woman should be determined independently of that of the husband. Such a provision is required not only in view of the rule at present applied in India[2] but also in view of the fact that some countries still apply the common law rule.[3] Such approach would be in conformity with the spirit of the Indian Constitution.

II. NATIONALITY—GENERAL DISCUSSIONS

Introductory.

15.5A. The next topic to be considered is the nationality of a married woman. Legal systems have adopted different approaches in this regard.

The possible alternative principles which may govern the nationality of married woman are :[4]

(1) that marriage shall have no effect; or

(2) that the wife shall take such nationality as shall depend on her own election:

but these are subject to variation. That marriage shall have no effect was the common law rule in England,[5] but it was changed by the Naturalisation Act of 1870, for the second rule, and this was in force for some time. It was the rule in the United States until reversed by the "Cable Act" of 1922, and, since then, a British woman marrying a United States citizen does not, without express naturalisation, become a citizen of the United States.[6] On the other hand, she looses her British nationality, and is, therefore, stateless, while a woman of the United States who marries a British subject at the same time retains American nationality. These cases of statelessness and double nationality are the result of the present contradictory systems. In general, they are avoided under the French

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[1]Section 1, English Act of 1971.
[2]Para. 15.2, *supra*.
[3]Para. 15.4, *supra*.
[4]See (1930) Law Journal, page 144.
[5]See (1930) Law Journal, page 144.
[6]See (1930) Law Journal, page 144.

nationality law of 1927, which substantially adopts the third rule, and makes the woman's change of nationality depend on her election.[1]

We consider it essential that married women shall have the right to determine their own citizenship, corresponding to their present equality in respect of property and political rights. The tendency in Europe appears to be to adopt the English rule, and make the wife's nationality follow that of the husband.[2] Apart from the abstract point of liberty and equality, this is probably the convenient rule. At any rate, the most pressing matter is to source, not that a married woman shall have any particular nationality, but that she shall not, by marriage, lose her original nationality without gaining another. In other words, the loss of one nationality should be conditional on the acquisition of the other; and this was one of the suggestions of the League of Nations Codifying Committee which dealt with the subject.

There is a careful survey of the whole question in a paper read by Mr. F. Liewellya Jonem, M. P., before the Grotius Society[3], where the position was described in detail. As rapporteur for the International Law Commission, Hudson expressed the following opinion.[4]

> "Under the law of some States nationality is conferred automatically by operation of law, as the effect of certain charges in civil status: adoption, legitimation, recognition by affiliation, marriage.
>
> Appointment as each at a university also involves conferment of nationality under some national laws.
>
> While these reasons for the conferment of nationality have been recognised by the consistant practice of States and may, therefore, be considered as consistent with international law, others have not been so recognised."

III. NATIONALITY—ENGLISH LAW

English law upto 1834.

15.6. Under the English common law, at least upto 1834, marriage did not affect a woman's nationality. In the *Countees Conway's case*[5] reported in that year, Baron Parke said:—

> "..... A French woman becomes in no way a British subject by marrying an English man; she continues an alien, and is not entitled to dower."

He referred to Coke on Littletonn[6] in this connection, the position in this regard has, however, been altered by statute in England.

The Naturalisation Act, 1870, in section 18, first laid down that a woman who is a British subject and marries an alien, should be deemed an alien. Section 10(1) of the British Nationality and Status of Aliens Act, 1914, expressed the same principle more elaborately, and enacted' that "wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien."

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[1]See (1930) Law Journal 144.

[2]See (1930) Law Journal 144.

[3]F. Liewellyn Jones, M. P., Transactions of the Cretius Society (1930), Vol. 15.

[4]*Yrbk*, I. L. C. (1952) 11.8. The rubric employed is : "Conferment of nationality by operation of Law".

[5]*Countess Conway's case*, (1834) 2 Napp. 364, 368, cited in *Bai Asha*, A. I. R. 1929 Bom. 81, 84.

[6]Coke on Littleton, page 326.

[7]Creig. International Law, (1970), page 292.

The position was again changed as a result of international conventions on the subject, and an amendment which was made in 1933 reversed the rule. The later Act of 1948, which contains the present British law on the subject, provides, in effect, that marriage does not, in itself, change the nationality of a woman.

IV. NATIONALITY—INDIAN LAW

Provision in Citizenship Act.

15.7. As regards Indian statute law relating to nationality, it may be stated that under section 5(1)(c) of the Citizenship Act, 1955, a woman married to a citizen of India does not automatically become an Indian citizen, though she may make an application and be registered as a citizen of India. A decision of the question whether she should be registered, is left to the discretion of the Central Government. In substance, the scheme of the Citizenship Act is in conformity with the U. N. Convention on the Nationality of Married Woman.[1]

The provisions of the Citizenship Act are, however, of no use in determining the question how far as Indian woman married to a *foreigner becomes a foreign citizen.* Nor does that Act deal with the question how far a non-Indian woman, on marriage, acquires the nationality of another country of which her husband is a national. These questions have to be determined apart from the Act.

Case law as to nationality of wife.

15.8. It has been held[2] by the Assam High Court that there is, in India, no presumption that the wife would, by marriage, acquire the hubsand's nationality.

So far as nationality is concerned, the theory of unity of the husband and wife for the purpose of determining the nationality does not seem to have found favour in England, or in other commonwealth jurisdiction.[3]

However, this theory seems to have been accepted in *some foreign countries* and it is because of that position that it may be desirable to provide, in the proposed law, that the nationality of the wife should be determinable separately from that of the husband.

V. RECOMMENDATION

Legislative device.

15.9. The position, therefore, that emerges from the above discussion is that it is desirable[4] to provide that the rule that on marriage the wife acquires the domicile[5] or nationality[6] of the husband shall not apply in relation to the recognition of foreign divorces and separations. There are several ways of providing what we have stated above, and, so long as the object is achieved, it does not matter what drafting device is adopted.

We give below some drafts for the purpose.

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[1]Article 3, U. N. Convention, U. N. Series, Vol. 139, page 87.

[2]Assam L. S. 1970, Assam 209 [Quinquennial Digest 1966-70, page 275, right hand, under Citizenship Act, section 2(b)]

[3]Rood Phillips, Constitutional & Administrative Law (1967), pages 416 and 418.

[4]Para. 15:7, *supra.*

[5]Para. 15:3, *supra.*

[6]Para. 15:4, *supra.*

(*Chapter* 15.—*Domicile and Nationality of the wife. Chapter* 16.—*Exceptions to Recognition.*)

Proposed section as to domcile and nationality of wife

(1) For the purposes of this Act, and subject to the provisions of sub-section (2), the domicile of a married woman as at any time after the commencement of this Act shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile.

(2) Where, immediately before the commencement of this Act, a woman was married and then had her husband's domicile by dependence, she shall be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin), unless and until it is changed by acquisition or revival of another domicile either on or after the commencement of this Act.

Alternative draft

(1) For the purposes of this Act, and subject to the provisions of sub-section (2), the domicile of a woman who is, or has at any time been, married, shall be determined as if she had never been married.

(2) Where, immediately before the commencement of this Act, a woman was married and then had her husband's domicile by dependence, she shall be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile or origin), unless and until it is changed by acquisition or revival of another domicile either on or after the commencement of this Act.

Another Alternative draft

(1) For the purposes of this Act, and subject to the provisions of sub-section (2), any rule of law whereby a woman on her marriage acquires her husband's domicile or nationality shall not be taken into account.

(2) Sub-section (*2*) as is main draft.

CHAPTER 16

EXCEPTIONS TO RECOGNITION—NOTICE AND OPPORTUNITY

Introductory.

16.1. Recognition of a foreign divorce or legal separation, whether on the proposed new grounds,[3] or on grounds[3] already regarded as valid in our existing law, must be subject to certain overriding requirements which justify the making of exceptions to the general rule of recognition.

Grounds of attack on judgment.

16.2. The attacks on a judgment may be classified as collateral, direct and equitable. A collateral attach operates in regard to a judgment only if it is void for want of jurisdiction, the theory being that a Court without the power to act can, in no way, affect legal relations.[4] Direct attack on a judgment is an attempt in the original *proceeding* to have the judgment set aside for error. Lastly, a prayer for equitable relief—either by way of an independent proceeding or by way of defence—protects a party from the effect of a judgment sought to have been obtained by improper means. Fraud belongs to the last category.

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[1]The last alternative draft is preferable.

[2]Chapter 14, *supra.*

[3]Chapter 13, *supra.*

[4]Note, "X Developments—*See judicata*", (1952) Harvard Law Review 818, 850.

Cases where exception needed.

16.3. Broadly speaking, the need for making such exceptions to recognition appears to arise in the following cases—

(a) where there is no subsisting marriage according to Indian law;[1]

(b) where the rules of natural justice have not been observed by the foreign court;[2]

(c) where public policy requires non-recognition of the divorce or legal separation;[3]

(d) fraud.[4]

We shall deal with the first two in this Chapter, reserving a discussion of the rest to other chapters.

No subsisting marriage.

16.4. First, as to the case[5] where there is no subsisting marriage according to Indian law (including its rules of private international law and also including the provisions of the proposed Act),[6] the justification for non-recognition of the divorce in such a situation is obvious. Where there was no subsisting marriage according to Indian law in the sense explained above, and the situation is one where the *Indian law of marriage* is properly applicable, the grant of recognition to the divorce or legal separation would be illogical, and would create confusion. Recognition of the divorce would mean recognition of the marriage—and if there is no marriage according to Indian law, this would create an inconsistent situation.

Certain special situations illustrating the absence of a valid marriage after divorce valid under proposed Act.

16.5. In this context, one aspect should also be referred to. Where the effect of applying the provisions of the proposed Act would be to confer validity on a divorce granted by a foreign country X, then, obviously, the marriage in respect of which divorce is decreed cannot subsist after the decree of divorce, if the decree falls within the class of decrees covered by the proposed Act. Now, it may happen that country Y (i.e. another country), does not recognise that divorce, and a court of that country later grants a divorce to the same parties *in respect of the same marriage.* This later divorce cannot be recognised by our courts; since our courts are bound to recognise the first divorce, the marriage does not subsist according to our law. The second divorce has, therefore, to be treated as void by our courts.

A negative illustration can also be taken. Let us assume, that by virtue of the proposed provisions, a particular foreign divorce *cannot be* recognised in India. The divorce is, however, recognised by, say, country X and a party to the marriage, now divorced, enters into a re-marriage with a third person in country X. This re-marriage is not a valid marriage in the eye of our law, since our courts do not recognise the divorce. The second marriage is, thus, void in the eye of our law. If this recarriage i.e. itself disolved by a decree of divorce in a foreign country, that divorce cannot be recognised in India, there being no subsisting (valid) marriage according to the conceptions of our courts. In order to ensure such a position, it is desirable to make a suitable provision by way of exception to the normal rules for recognition.

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[1]Para. 16:4, *infra.*
[2]Para. 16:7, *infra.*
[3]Chapter 17, *infra.*
[4]Chapter 18, *infra.*
[5]Para. 16:4, *supra.*
[6]Para. 16:5, *infra.*

A general formula, such as—"where there is no subsisting marriage"—would cover all these cases. The English Act[1] has a provision on the subject, on similar lines.

16.6. It may be added that the situation may be one where Indian Law (internal Indian law), does not apply to the divorce.

Rules of private international law, as is force in India, are to be taken into account in that case, and if the result of the application of these rules is that there is no subsisting marriage, then, again, the divorce cannot be recognised. This situation may arise where the marriage is *null and void* by reason of the application of Indian rules of private international law. For example, if the marriage was solemnised *in India* in violation statutory requirements as to prohibited degrees, the dignity and consistency of our legal and judicial system would demand that the divorce be disregarded.

16.7. This takes us to the second exception[2] needed in relation to recognition. That relates to a foreign decree passed in breach of natural justice. The English Act[3] has a specific provision on the subject, the gist of which is that a foreign decree will not be recognised in England if either the other party had no reasonable notice of the proceedings, or if the other party had, apart from notice, no reasonable opportunity of hearing. For both the purposes—i.e. for determining the reasonableness of the notice and reasonableness of the opportunity—regard is to be had to the nature of the proceedings and "all circumstances" (of the case). **Breach of natural justice.**

The relevant provision in the English Act reads—

"(*2*) Subject to sub-section (*1*) of this section, recognition by virtue of this Act or of any rule preserved by section 6 thereof of the validity of a divorce or legal separation obtained outside the British Isles may be refused if, and only if—

(a) it was obtained by one spouse—

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

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

This could be adopted in our law also, being obviously fair and required by the canons of justice.

CHAPTER 17

PUBLIC POLICY

I. INTRODUCTORY

17.1. Public policy constitutes another possible exception in regard to the recognition of foreign judgments. **Introductory.**

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[1]Section 8(1), English Act of 1971, para. 10.15, *supra.*

[2]Para. 16.3, *supra.*

[3]Section 8(2), English Act of 1971

Public Policy not a definite expression.

17.2. It must be stated, at the outset, that public policy may not be a very precise ground for non-recognition.[1] The expression "public policy" is not a very definite one. In broad terms, however, it may be described as a reflection of the general ideological approach of the legal system.[2]

Edwin W. Patterson[3] points out that "policy", in its etymological significations, refers to plans for governmental action rather than to moral or ethical principles. However, the expression is now familiar, and almost all legal systems have some provision or other for not recognising foreign judgments on the ground of "public policy" or "order public" or some similar concept. The details and names may differ, but the concept is substantially the same.

The aspect of public policy was mentioned in *Satya's case* where the Supreme Court observed—

> "38. As we have stated at the outset, these principles of the American and English conflict of laws are not to be adopted blindly by Indian courts. Our notions of a genuine divorce and of substantial justice and the distinctive principles of our public policy must determine the rules of our private international law. But an awareness of foreign law in a parallel jurisdiction would be a useful guideline in determining these rules. We are sovereign within our territory but "it is no derogation of sovereignty to take account of foreign law" and as said by Cardozo J., "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home"; and we shall not brush aside foreign judicial processes unless doing so 'would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.' *Loucks* v. *Standard Oil Co. of New York* (1918) 224 *N. Y.* 99 *at p.* 111."

The various approaches to public policy have been described more often than once,[5] and we shall also refer to them later[6]. The concept is essentially elastic. In a case where the matter is not governed by a statute or by clear established principles, the consideration of what is "public policy" must necessarily involve the balancing of advantages against disadvantages,[7] to the community at large, in the light of current notions of propriety.

Public policy not concerned with the ideal.

17.3. Public policy is not concerned with what ought to be the law. Winfield[8] pointed out long ago, that while some ethical standard may be discoverable in judicial legislation, it will not be found in public policy. That doctrine, he said, may answer the question, "What is it that the community wants now?" It is dumb before the question, "What is it that an *ideal community* ought to want?"

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[1]Freud, "Reflection of Public Policies in the English Conflict of Law", (1954) 39 Transactions of Grotius Society 38, 83.

[2]Winfield, "Public Policy", (1929) 42 Harv. Law Rev. 76.

[3]Patterson, Jurisprudence, (Brookyln 1953), page 282.

[5]*Satya* v. *Taja*, A. I. R. 1975 S. C. 104, 115, para. 38.

[5](a) Norman March, "Severance of Illegality" (1948) 64 Law Quarterly Review 230, 347; (b) Mussbaum; "Public Policy in Conflict of Laws", (1940) 49 Yale Law Journal 1027; (c) Knight, "Public Policy in English Law", 38 Law Quarterly Review, 207.

[6]Para. 14:11 to 14.14, *infra*.

[7]*Apt.* v. *Apt.* (1947) 2 All Eng. Reports 677 (Cohen L. J.).

[8]Winfield "Public Policy" (1929) 42 Harvard Law, Rev. 76, 87.

"A judicial decision on public policy will give us something more subtle than the common place of a Greek tragic chorus, but it will not soar to the ideal of the citizens in Plato's Republic; and, if one may say so without impertinence, nothing but danger and confusion could result if the judges made any such attempt. Our common law is at such a mature age now that the lines of its trunk are settled, whatever may be the direction of its new branches".

History of public policy.

17.4. As to public policy, it is not surprising to find contradictory opinions expressed as to its value by different judges, or even by the same judge on different occasions.[1] In 1824, in the Court of Common Pleas and Court of the King's Bench,[2] there are dicta which are not easy to reconcile. In the King's Bench case, Abbott, C. J. not only took public policy as he found it, but carried it a step further than it had gone before him.[3] In the Common Pleas case[4], on the other hand, Best, C. J. thought that the courts had gone much further than they were warranted on questions of policy, and that where such questions were doubtful, thy ought to be left to the legislature. It was in the same case[5]—*Richardson* v. *Mellish*—that Mr. Justice Burrough took a similar view and used the expression "unruly horse"—a phrase which he is said to have borrowed from Chief Justice Hobart and which has now been quoted times out of number.

Roman law.

17.5. It was a Roman practice to incorporate, in statutes, a saving clause to the effect that it was no purpose of the enactment to abrogate what was sacrosanct or just.[6] Public policy achieves some such result.

Public policy in contracts.

17.6. Public policy in the realm of contracts is well-known. It is recognised in section 23 of the Indian Contract Act, 1872. One hears of public policy in contracts in restraint of trade certainly, as early as Elizabeth,[7] and, though, in many of the cases, public policy is not mentioned, or is preferred to only as one of the grounds of the decision, one can safely say that it was clearly recognized by the time of *Mitchel* v. *Reynolds*,[8] which was decided in 1711 and was, for a long time, a land-mark in this branch of the law.

Various shades of this concept are found in judgments reported in the 17th and 18th centuries.

Public policy and the perpetuity rule.

17.7. Then, public policy bulks large in that great decision on the rule against perpetuities, the *Duke of Norfolk's case*.[9]

To the question, "where will you stop, if you do not stop here?", Lord Nottingham retorted, "I will tell you where I will stop: I will stop wherever any visible inconvenience doth appear."

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[1]Winfield, "Public Policy", (1929) 42 Harvard Law Review 76, 87.

[2]See Plumer, V. C., and Eldon, L. C., in *Vauxhall Bridge Co.* v. *Spencer*, (1817), 2 Madd. 356, 365 Abbot, C. J. in *Card* v. *Hope*, (1824), 2 B. & C. 661, 670.

[3]*Card* v. *Hope*, (1824), 2 B. & C, 661, 676. While public policy is not mentioned in the judgment, it underlines the decision.

[4]*Richardson* v. *Mellish*, (1824) 2 Bing. 229, 242-243, 252.

[5]*Richardson* v. *Mellish*, (1824) 2 Bing. 229.

[6]Winfield, "Public Policy", (1929) 42 Harvard Law Rev. 76, 159.

[7]Winfield, "Public Policy", (1929) 42 Harvard Law Rev. 76, 85.

[8]"Against the policy of the common law", I. P. Wms. 181, 183 (1711); "against the policy of the law", *ibid.*, at 187. *Cf.* "Encounter is necessity del commonwealth". Anon, Moore K. B. 242 (1586); *Claygate* v. *Batchelor*, Owen 143 (1600); "contrary to common good," *Jolliet* v. *Broad*, Noy 98 (1619).

[9]*Duke of Norfolk's case*, (1681) "Policy of the Kingdom," Ch. Cas. I, 20 "inconvenience," *ibid.*, at 49, 51.

"Conflict of Laws and public policy".

17.8. We have, in the above discussion, drawn some examples from other branches of the law. We shall, in due course, deal with the ambit of public policy in the conflict of laws. But, before we do so, its proper scope in general may be conveniently dealt with, with reference to a few cases.

II. AMERICAN CASES ON PUBLIC POLICY IN CONFLICT OF LAWS

Public policy in relation to extra-state causes of action.

17.9. Public policy is not necessarily identical with the current laws of the particular country. Judge Cardozo, in the famous *Loucks case*,[1] observed that "we are not so provincial as to say that every solution of a problem is wrong because we deal with it "otherwise at home". In the *Mertz case*,[2] the New York court reverted to the old rule, after Cardozo was gone. But, again recently, the New York Court of Appeal (Cardozo's court), has re-established his enlightened hospitality to extra-state causes of action,—causes of action which New York's substantive law would not have allowed in the first place.

That was the case of *Intercontinental Hotels Corp*, v. *Golden*,[3] the New York action was on a cheque and several "I. O. U.'s" which the defendant (New York resident) had given in Puerto Rico, in return for money subsequently lost at play in the plaintiff's gambling casino there. These gambling debts were valid under the Puerto Rican law, but the contracts involved would not have been valid in New York. Recovery was, nevertheless, allowed.

Local public policy, as a ground for denying access to local courts, was not abandoned, but was restricted to transactions "inherently vicious, wicked, or immoral, and shocking to the prevailing moral sense". Emphasis was placed on the idea that public policy, for this purpose, is to be discovered by the courts not so much from statutes or constitutions (law in the books), as from currently prevailing community attitudes.

American cases.

17.10. In the case of *In re Liberman*[4] the New York Court of Appeal held that a condition in a trust arrangement, to the effect that the beneficiary should lose the right to the trust fund if he should contract a marriage without the consent of the trustees, was contrary to public policy.

In *Big Cottonwood Tanner Bitch Co.*, v. *Moyle*,[5] the Supreme Court of Utah made the following statement:—

> "In view of the fact that Utah is an arid state and the conservation of water is of first importance, it is with great hesitancy that we subscribe to any contention which would make it appear to be more difficult to save water. It has always been the public policy of this state to prevent the waste of water."

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[1] *Loucks* v. *Standard Oil Co.*, (1918) N. Y. 99, 111, 120, N. E. 198, 201, cited by Laflar, American Conflict of Laws (1968), page 105.

[2] *Mertz* v. *Mertz*, (1936) 271 N. Y. 466, 3 N. E. 2d 597, 108 A. L. R. 1120 (tort action by wife against husband; New York refused to enforce, though Connecticut, where the facts occurred, would give a cause of action); cited by Leflar, American Conflict of Laws (1968), page 105.

[3] *Interncontinental Hotels Corp.* v. *Golden*, (1964) 15 N. Y. 2d 9, 13, 203 NE 2d 210, 212, 254, N. Y. S. 2d 527, 529, (Majority view), cited by Leflar, American Conflict of Laws (1968), page 105.

[4] *In re Liberman*, (1939), 18 N. E. 2d 658, cited in Bodenheimer, Jurisprudence (1967), page 314.

[5] *Big Cottonwood Tonner Ditch Co.* v. *Moyle*, (1945) Utah 197, 203, cited in Modenheimer, Jurisprudence (1967), page 314.

17.11. These cases will show the scope of public policy, and the emphasis placed on various considerations in the U. S. A.

III. CONFLICT OF LAWS—PUBLIC POLICY ON THE CONTINENT.

Public policy on the continent in conflict of laws.

17.12. On the continent, in the field of conflict of laws, the principle of public policy is of great importance. It appears that under this rubric, the application of foreign legal rules is barred where such application would conflict with the fundamental moral ideological, social, economic or cultural standards of the forum, or where it is necessary that the domestic legal rules should be *unconditionally and absolutely applied,* or where the principle of the foreign legal rule conflicts with the mandatory rules of the law of nations, or international commitments of the state of the forum, or the requirements of justice, as generally recognised by the international legal community.

17.13. An early "statutist" version of the "orders public" can, perhaps, be seen in the refusal to apply statutes *odiosa,* and an equivalent may be seen in Huber's cautious and incidental reliance on the overriding interest of *ordre public* against such modest universality as conflicts law based on mere comity could command.[1] But only Mancini's allembracing principles could move the *ordre public* into the centre of attention[2].

Example from Eastern Europe.

17.14. In the Russian Civil Code,[3] for example[4], it is provided that "foreign law cannot be applied if it is inconflict with the foundations of the Soviet system."

According to the Hungarian law[5] on marriages, foreign law cannot be admitted "if it infringes the Constitution or a rule of Hungarian law which insists on absolute application." Again, according to the Hungarian Law of Civil Procedure[6] the decision of a foreign Court cannot be recognised in Hungary, if recognition infringes the Constitution or a rule of Hungarian law which insists on absolute application.

17.15. It has been stated by William Butler[7]:—

"The conception of ordre public, or public policy as the somewhat narrower principle is known in common law countries, has not produced fundamental ideological cleavages among continental European and Anglo-American jurisdictions, although many jurists have justly been apprehensive of its inchoate and potentially unlimited scope. To Soviet jurists, however, the option of excluding the application of foreign law deemed incompatible "with the essential principles of justice and morality of the forum seemed to be a tailor-made excuse for refusal to recognise the social and legal reforms wrought by the revolution of 1917. And indeed this fear appeared to be confirmed when, particularly in the interwar period, many Western courts declined to give extra-territorial effect to Soviet nationalization decrees partly on the basis of public policy. Soviet courts, of

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[1]Ehrenzweigh, Conflict of Laws, (1962), page 342.

[2]Ehrenzweigh, Conflict of Laws, (1962), page 342.

[3]Section 568, Civil Code of Russian Federation, (June 11, 1964).

[4]As to Russia, see, further, para. 17.15, *infra.*

[5]Section 45, Hungarian Decree No. 23 of 1952—Marriage, family relations and guardianship.

[6]Decree No. 22 of 1952 (Code of Civil Procedure) Section 16.

[7]William e. Butler (Reader in Comparative Law, University of London), Book Review of Andre Carnefsky, Public Policy in Soviet Private International Law, (1970) (2d ed.) Vol. 18, A. J. C. L. 604.

course, might have retaliated by framing their own doctrine, of *ordre public*. But there is an aversion to judge-mades law in the U.S.S.R., and public policy seldom is cited in reported Soviet decisions."

IV. FRENCH LAW

Public policy in France.

17.16. In French law, the corresponding concept is "ordre public". The concept "ordre public" is applied, in private international law, to prevent undesirable results from a too objective an "international" approach. To start with, there is a system (more or less clearly defined), of choice of law and other conflicts principles. But this system is liable to be checked by public policy or *"ordre public"*. The effect of the check is to prevent the application of foreign law and to substitute French law.

Public policy may be said to operate in two ways in private international law[1]: (a) it may ignore foreign prohibitions which are distasteful to the lex fori;[2] (b) it may introduce objections and prohibitions not contained in the foreign law. In illustration of (b), it may be stated that in practice, cases before the French courts may be decided by *French law*, even if the personal law of the parties is derived from another system. This could take place when the foreign solution shocks French conceptions of morality or justice; for example, a foreign law which permitted the marriage of a brother and sister, or recognised slavery as a legal status, would not be recognised in France.

French cases.

17.17. Specific French ruling as to the non-recognition of foreign divorces are not available in the context of *"public ordre"* However, it would appear that French practice makes a distinction between (i) cases where rights have been already acquired by foreigners and only enforcement or recognition is sought in france, and (ii) cases where the suing party directly seeks to acquire rights in France in accordance with the provisions of a foreign legal system. In the former case, the French Courts are ready to give a wider recognition to the foreign judgment, than in the latter case.

Thus, although the French courts will apply the divorce law of the nationality of the parties, *"public ordre"* will not permit a decree to be granted by a French court on grounds not permitted by domestic French law. But a decree of divorce obtained by foreigners abroad would be upheld in France, even though the ground of divorce is not one on which a French court would grant divorce. Again, as regards the ceremony of marriage, French law permits foreign nationals marrying in France to enjoy the benefits of their own domestic law, except where the foreign law ignores vital social considerations—as for example, minimum age. Again, a marriage celebrated between foerigners abroad in accordance with the foreign law, between an uncle and niece which, if solemnised in France, is permitted only by special dispensation, would be upheld without the safeguard of the dispensation, but a marriage between brother and sister would be regarded as void *under all* circumstances.[3]

A French court would reject a German judgment ordering a putative father to maintain his child, as being contrary to *"public ordre"*, since the judgment could be used to found a claim of paternity under the Civil Code which could not otherwise be maintained[4].

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[1]See Niboyet, Traite de Dreoit international private franchise (Vol. V, 1948), section 1492, referred to in (1961) Can. Bar Rev. 307.

[2]*Cf. Sottomver* v. *De Bœrros*, (No. 2) (1879), 5 P. D. 94 as to English Law.

[3]Lloyd, public policy (1953), pages 80-82.

[4]Lloyd, Public Policy (1963), pages 96-97.

V. COMMON LAW

Public policy in common law in relation to conflict of laws.

17.18. In the common law system, public policy has a more limited role in the field of conflict of laws. There is no choice of law problem in regard to divorce. Also, there has not been, on the whole, so much emphasis on methodology as in French law[1] (and in some other European systems)—involving a division of the problem into (a) the application of the conflicts rules, (b) the effects of public policy. If the *lex fori* is not applied, then the choice of law determinants which affect recognition problems, are (i) the personal law, and (ii) the rule *locus regit actum*[2]. The former enters into questions of capacity to marry in many jurisdictions, and the usual attitude of the courts is to reject a foreign law solution indicated by the personal law, only where the solution is considered *to be inconsistent with fundamental moral or social concepts.* Public policy is thus an *ultimum remedium*, and there have been few English cases[3] in which it has been raised explicitly in the context of private international law.

17.19. A query has been raised whether this means that the common-law systems consider the content of the foreign law only in exceptional circumstances, where the foreign law might offend some of the most deeply held policies of the forum.

In this context, Drucker[4] quotes, from a book on private international law by Professor Lund of Moscow University, published in 1949, a statement to the effect that in the Anglo-American jurisdictions, private international law is : "One of the means of legal technique directed to restrict the applicability of foreign laws, and to widen the sphere of municipal law.....".

This would show that the objective employed is the same, both on the continent and in common law, though the scope for the application of the doctrine of public policy is more limited in common law than in continental countries.

English cases.

17.20. English reported cases dealing with public policy, are comparatively few, in the field of conflict of law.[5] Most of the English cases which[6] are habitually adduced to prove early appication of public policy, are not really[7] in point.[8] And, indeed, there was neither need nor use of the doctrine until the establishment of the "vested rights" dogma at the end of the last century.

In this field, as in others, "public policy" appeared when the common law failed to keep "in touch with the needs of the day."[9]

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[1]*Cf.* Para. 17.13, *supra.*

[2](1961) Can. Bar Rev. 309.

[3]*See* for instance—

(a) *Pugh* v. *Pugh* (1951) Probate 482; (1951) 2 All. E. R. 680 (Capacity to marry).

(b) *In re. Paine,* (1940) 1 Ch. 46; (Capacity to marry). For comment, see 56 L. Q. R. 514.

(c) *Brook* v. *Brook,* (1861) 9 H. L. C. 193; (Capacity to marry) (Deceased wife's sister).

(d) *Mette* v. *Mette,* (1859) 1 Sw. and Tr. 416. (Deceased wife's half sister).

[4]Drucker in (1955) 4 Int. & Comp. L. Q. 386.

[5]*See* para. 17.18 *supra.*

[6]See also Katzenbach, "Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law", (1956) 65 Yale L. J. 1087.

[7]Ehrenzweigh, Conflict of Laws (1962), page 342.

[8]*Robinson* v. *Bland,* 2 Burr. 1077, 97 Eng. Rep. 717, (1760) (contract unenforceable under both laws); *De Wutz,* v. *Hendricks,* 2 Bing. 314, 130 Eng. Rep. 326 (1824) (contract held "contrary to the law of nations" as directed against friendly government); *Sentos* v. *Illidga* 8 C. B. (N. S.) 861, 141 Eng. Rep. 1404 (1860 (interpretation of statute in terms of applicable to foreign transaction); *Crell* v. *Levy,* 16 C. B. (N) S.) 73, 143 Eng. Rep. 1052 (1864) (contracts to be performed in England). Only *Hope* v. *Hope* 8 De G. M. & G. 731, 743, 44 Eng. Rep. 572, 576 (1857) was based on the forum's "policy".

[9]Holdworth, A History of English Law (1926), Vol 8 page 56.

Alternative to public policy—Story's approach.

17.21. In 1827, Louisiana court remarked "that in the conflict of laws, it must often be a matter of doubt which (law) should prevail, and that whenever that doubt exist, the court which decides, will prefer the law of its own country, to that of the stranger."[1] Story found "great truth" in this statement, and returned to its message in virtually every chapter of his analysis[2], without having to resort to an "exception" of public policy.

Only in those few areas where past centuries had produced a semblance of rules "by which nations are morally or politically bound,"[3] was there need, and indeed room, in his work for such an exception.[4]

Classification by Cheshire.

17.22. Cheshire, in an earlier edition[5] of his Private International Law, divided English cases on public policy into four classes, *viz.*—

(1) Where the fundamental conceptions of English *justice* are disregarded for example, where a party has been denied a proper hearing, or there is fraud, undue influence or duress as in the case of *Kaufman* v. *Gerson.*[6]

(2) Where English conceptions of *morality* are infringed.[7] This is apparently confined to sexual immorality.

(3) Where the transaction prejudices the interests of the *United Kingdom or its relations with foreign powers;* e.g., agreements involving relations with enemy aliens[8], or to further revolt abroad,[9] or for the import of liquor contrary to foreign prohibition laws.[10] The cases cited were concerned with English contracts. It may be, however, that the rule of internal public policy would probably be applied externally in the case of similar contracts governed by foreign law.

(4) Where a foreign status offends the English *conception of human liberty and freedom of action,*—e.g., a contract relating to slavery, or the status of a 'prodigal' in French law[11], or a foreign rule prohibiting remarriage after a decree of divorce has finally dissolved the marriage.

The last mentioned class, according to Lloyd[12], seems indeed to be no more than an illustration of English public policy in *relation to personal freedom,* and it probably needs to be broadened to cover such other freedoms as freedom of trade, which the common law regards as its distinctive policy to protect.[13]

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[1]*Soul* v. *His Creditors* 5 Martin R. (N. S.) 569, 595 (La 1827).

[2]Story 29.

[3]Story 71.

[4]Thus, Story believed that "by the general law of nations, jure gentium (a contract valid under the law of the place where it is made, is) held valid everywhere". Story 201. To correct the results of this (erroneous) assumption, the lex fori re-enters as to contracts "against good morals, or region or public rights". Id.; at 213. See also as to marriage contracts, id. at 104.

[5]Cheshire, Private International Law (1952), pp. 145-9, cited by Lloyd, Public Policy (1953) of Cheshire 1975, page 152-155.

[6]*Kaufman* v. *Gerson,* (1904) 1 K. B. 591.

[7]*Robinson* v. *Bland,* (1760) 2 Burr. 1077, 1084.

[8]*Dynamit A. G.* v. *Rio Tinto,* (1918), A. C. 292.

[9]*De Witz* v. *Nedricks,* (1824) 2 Bing, 314.

[10]*Foster* v. *Criscoll,* (1929) 1 K. B. 470.

[11](a) *Worms* v. *De Caldor,* (1880) 49 L. J. (Ch.) 261;

(b) *Re Selot's Trusts,* (1902) 1 Ch. 488.

[12]Lloyd, Public Policy (1953), page 95.

[13]*Cf.* (*a*) *Roussillon* v. *Roussillon,* (1880) 14 Ch. D. 351;

(*b*) *Warner* v. *Helson,* (1937) 1 K. B. 209.

Public policy and duress.

17.23. Public policy could be a useful head for dealing with duress. If fraud is regarded as a vitiating cause, then duress also should be so regarded. The means employed should not matter, if the freedom of will of a party is in issue. It should also be immaterial whether the vitiating factor operated on the party directly or so acted indirectly. Lord Devlin observed, in another context,[1] "All that matters to the plaintiff is that, metaphorically speaking, a club has been used. It does not matter to the plaintiff what the club is made of—whether it is a physical club or an economic club, a tortious club or an otherwise illegal club."

Duress in relation to marriage.

17.24. We may refer to a case illustrating duress. In Szechter v. Szechter[2], the petitioner consented to marriage, in order to escape from imprisonment in truly appalling conditions and from threats of a mental home; a severe sentence of imprisonment, followed almost certainly by re-arrest; and, in any event, by the prospect of penury, inability to obtain any employment other than of a mental nature and inability ever to lead a normal life. Sir Jocelyn Simon, President, in giving his reasons for making a decree of nullity, said—

> "It is, in my view, insufficient to invalidate an otherwise good marriage that a party has entered into it in order to escape from a disagreeable situation, such as penury or social degradation. In order for the impediment of duress to vitiate an otherwise valid marriage, it must, in my judgment, be proved that the will of one of the parties thereto has been overborne by genuine and reasonably held fear caused by the threat of immediate danger (for which the party is not himself responsible), to life, limb or liberty, so that the constraint destroys the reality of consent to ordinary wedlock".

He also added that for a threat to be an immediate specific threat, "It is sufficient if there is a present continuing danger, though the apprehended death, injury or deprivation of liberty may not happen until an unknown future time. Equally, in my judgment, though dangers of mere penury or social degradation will not of themselves invalidate an otherwise good marriage, they cannot be disregarded if they form an essential element in the danger to life, limb or liberty."

Duress in relation to dissolution.

17.25. In the case of Mayer[3], Bagnall J. after discussing *Szechter* v. *Szechter*[4], observed:—

> "The doctrine of duress then applies to the contract of marriage; does it apply to a dissolution of marriage? If the question arose in relation to a system of law which recognised divorce by consent, I should have no doubt that the doctrine would apply. For, as in marriage, there would be a special type of contractual arrangement which altered status. But the doctrine is not confined to acts which are contractual, or bilateral or multilateral; it applies to making a will and it applies to a voluntary disposition *inter vivos*. I can see no reason in logic or in principle why it should not apply to a decree of divorce obtained under duress, at any rate where an English court is considering a decree granted by another jurisdiction.

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[1] *Rooke* v. *Bernard*, (1964) A. C. 1129, 1209 (per Lord Devlin); also *ibid.*, at pp. 1109, 1201.

[2] *Szechter* v. *Szechter*, (1971) 2 W. L. R. 170, 180.

[3] *In re Mayer*, (1971) 2 W. L. R. 401, 407, 408 (Bagnall J.).

[4] *Szechter* v. *Szechter*, (1971) 2 W. L. R. 170, [Para. 17·24, *supra*.]

It may be that different considerations would apply if an English court were considering a decree pronounced by an English court; but I am not concerned with that situation.

"I should add that I am fortified in my opinion by an obiter dictum of Barnard J. in *Burka* v. *Burka*[1] shortly reported in the Times, March 17, 1955, where after holding that a marriage contracted in Russia, was invalid, the judge added that if the marriage had been valid, he would have held that a decree of divorce obtained in Russia would have been ineffective to dissolve it because the wife was being "persecuted and tyrannised to obtain a divorce". It appears from the file, which I have examined, that there, the Russian wife and her mother were being threatened with terms of imprisonment unless she obtained a divorce."

Public policy as the ultimate foundation.

17.26. In India, England, America and other countries, generally rules which protect a person against undue influence, exploitation bordering on blackmail or extreme restriction of personal freedom, are wellknown. These rules could be regarded as the special manifestations of the principle of good faith and decency; but, in the ultimate analysis, they could be treated as application of the doctrine of public policy. The application of the doctrine, no doubt, varies in time and space, and also with the sense of justice of the Judge.

Further, it involves a value judgment, standing above the literal text of the law; but the rationale of its application, in general, is that the foreign legal provision which is otherwise regarded as applicable under the rules relating to the conflict of laws is not acceptable, being inconsistant with the values, explicit or implicit, in the internal legal order.

Doctrine elsewhere.

17.27. It is to be noted that the doctrine of public policy is not confined to continental countries, and similar doctrines are found in many other countries, for example, Argentine[2], Brazil[3], and Mexico[4]. The application of the doctrine is not confined to recognition of judgments. The doctrine is also relevant in connection with the proceedings in progress or terminated abroad, and in connection with certain other procedural matters.

VI. STATUTORY PROVISION IN ENGLAND

English Act.

17.28. The recent English Act as to the recognition of foreign divorces and separations allows the English courts to refuse recognition on the ground of public policy[5].

VII. CONCLUSION

Conclusion.

17.29. Having regard to all aspects of the matter, we are of the view that a simple provision on the subject of public policy should be inserted.

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[1]*Burka* v. *Burka* (unreported).

[2]Argentina Federal Code of Civil Procedure, section 599.

[3]Brazilian Code of Civil Procedure, section 792.

[4]Mexican Code of Civil Procedure, section 785.

[5]English Act of 1971, section 8(2)(b).

CHAPTER 18

FRAUD

I. INTRODUCTORY

Introductory.

18.1. Fraud as a ground of non-recognition of decrees of divorce and legal separation appears to be a topic having an importance of its own.

The importance of a consideration of the matter in the context of recognition of foreign decrees of divorce is obvious. On the one hand, confidence must be placed in the *judicial process of other countries*, and too frequent a departure from the general rule could mean creating limping marriages. On the other hand, there are special circumstances which should be taken note of. That is the broad consideration which underlies the exception for fraud.

Two types of fraud.

18.2. We may mention that there are two categories of fraud.—(i) fraud as to the merits of the case, and (ii) fraud as to the jurisdiction of the Court. In general, fraud of the first category is not taken into account by the courts in India when exercising the power preserved by specific statutory provisions[1] in relation to questioning the validity of a foreign judgment in particular, or judgments in general. In the field of matrimonial law also, the cases more frequently relate to the second category of fraud.

In the U. S. A., it is stated that courts will consider only that fraud which deprives a court of jurisdiction, such as service of process obtained by fraud. Fraud, which may give rise to equitable relief (often called extrinsic fraud) does not deprive a court of jurisdiction. It is, therefore, stated[2] that the real basis for the attack on a judgment is want of jurisdiction, the fraud only being a cause therefor. We need not express an opinion on this view. In any case, if this view is correct, it reinforces the need for recognising fraud as a ground of attack.

II. INDIAN LAW

Effect of fraud in judgments—Analysis in Bombay case of various situations.

18.3. With reference to Indian law, we shall first examine the effect of fraud on judgments in general. In India, it is well-established that the validity of a judgment is subject to attack on the ground of fraud. In *Ahmedbhoy's case*[3], the Bombay High Court considered at length the question of fraud as affecting judgments, on general grounds of English law, with reference to three classes of persons, namely—

(a) privies;

(b) persons, who though not privies, were represented in the proceedings;

(c) strangers.

The High Court observed—

"In the first place the judgment may be an honest one, obtained in a suit conducted with good faith on the part of both plantiff and defendant. In such a case, the previous judgment is clearly binding both on class (a) and class (b); class (c) will be in no way affected by the judgment if it is *inter parties*, but if it be one *in rem* passed by a competent Court they will be bound by and cannot controvert it. In the *second* place, the judgment may be passed in a suit really contested by the parties thereto, but may be obtained by the fraud of one of them as against the other. There

[1] Section 13, Code of Civil Procedure and section 41, Evidence Act.

[2] See, (a) Note "Foreign Judgments and *res judicata*" (1928) 41 Harv. L. R. 1955, and (b) "Developments—*res judicata*" (1952) 65 Harv. L. R. 818, 851.

[3] *Ahmedbhoy* v. *Rubibhoy*, (1882) I. L. R. 6 Bom. 703.

has been a real battle, but a victory unfairly won. In this case, again, class (a) and class (b) and, as regards judgments *in rem*, class (c), are in one and the same position, which is that of the parties themselves. The judgment is binding on them so long as it remains in force, but it may be impeached for fraud and set aside if the fraud be proved. In the *third* place, the previous judgment may have been obtained by the fraud and collusion of both the parties to the former suit. In this case, there has been no battle, but a sham fight. As between the parties to such a judgment, it is binding. The same rule will apply between the privies of these parties, except probably where the collusive fraud has been on a provision of the law enacted for the benefit of such privies."

We have quoted this passage to show the general approach adopted by courts in India in relation to fraud as affecting the validity of a judgment.

Ex-parte decrees.

18.4. It may be noted that these principles apply even where the procedural law allows other remedies to deal with the particular species of fraud. Thus, in the case of an *ex parte* decree, the defendant can file a suit to have it set aside on the ground of fraud, even though he has failed to have it set aside under Order 9, rule 13, of the Code of Civil Procedure, 1908.[1] The two remedies are distinct. The remedy under Order 9, rule 13, is a summary one. The suit on fraud is really an analogue of the Equity 'Bill'.[2]

Power of Court.

18.5. The authorities on the question as to the powers of a Court to treat decrees which had been obtained by fraud as nullities, are reviewed at some length in the judgment on the original side in the High Court at Calcutta by Stonley, J. in the case of *Nistarini Dassi* v. *Nundo Lal Bose*.[3] In the latter case of *Rajib Panda* v. *Lakhan Sendh Mahapatri*,[4] also, the true meaning and effect of section 44 of the Evidence Act were considered.

Fraud as a defence to a judgment.

18.6 Fraud, besides being made a ground of attack, can be a ground of defence also. When a subsisting judgment, order or decree, which is relevant under sections 40, 41 or 42 of the Indian Evidence Act, 1872, is set up by one party to a suit as a bar to the claim of the other party, it is not necessary, for the party against whom such judgment, order or decree is set up, to bring a separate suit to have the same set aside, but it is open to such party, in the same suit in which such judgment, order or decree is sought to be used against him, to show, if such be the case, that the judgment, order or decree relied upon by the other side was delivered by a Court not competent to deliver it, or was obtained by fraud.[5]

Legislative approach in India—Section 13, C.P.C. and section 44, Evidence Act.

18.7. These principles are not confined to judgment of Indian courts; they are equally applicable to foreign judgments. We may mention, in this connection, that section 13 of the Code of Civil Procedure, 1908, to which we have already made a reference[6] in our general discussion of the Indian law as to recognition of foreign judgments, specifically mentions fraud when enumerating the circumstances in which a foreign judgment is *not* conclusive proof. Similarly, the Indian Evidence Act, in section 44, while providing for the relevancy of certain judgments, expressly[7] allows a judgment, even if otherwise relevant, to be attacked

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[1] *Radha Raman* v. *Pran Nath*, I. L. R. 28 Cal. 475 (P. C.).

[2] *Cf. Wyett* v. *Palmer*, W. N. (20th May, 1899), page 74, referred to in *Nistarini Dassi* v. *Nundalal Bose*, I. L. R. 26 Cal. 891, 915.

[3] *Nistarini Dassi* v. *Nundo Lal Bose*, (1899), I. L. R. 26 Cal. 891, 907 to 910.

[4] *Rajib Panda* v. *Lakhan Sendh Mahapatri*, (1899) I. L. R. 27 Cal. 11, 15, 21 (Melean C. J. and Banerjee, J.).

[5] *Bansi Lal* v. *Dhapo*, (1902) I. L. R. 24 All. 242, 247 (Stanley, C. J. and Burkin, J.).

[6] See Chapter 4, *supra*.

[7] Section 44, Indian Evidence Act, 1872, quoted in para. 18·17, *infra*.

on the ground of fraud. This provision of the Evidence Act applies also to judgments mentioned in section 41 of that Act—i.e. certain judgments affecting status. These statutory provisions give sufficient indication of the legislative recognition, in India, of the common law principle that the validity of a judgment can be questioned on the ground of fraud.[1]

18.8. We need not, for the present purpose, discuss the precise boundaries of this principle, or the proper procedure that should be adopted for invoking the jurisdiction of the court. But it is desirable to mention a few points of importance, and we shall discuss these points after dealing with the English law on the subject of fraud.

III. ENGLISH LAW

Fraud in England as affecting judgments in general.

18.8A. In England, the general principle that the validity of a judgment can be attacked on the ground of fraud[2], is accepted. *Coe* v. *Langford*[3], for example, decided that where the judgment has been obtained by fraud, the court has jurisdiction, *in a subsequent action brought for that purpose*, to set the judgment aside.

In *Jonesco* v. *Beard*,[4] it was said by Lord Buckmaster—

> "It has long been the settled practice of the court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires."

Whether remedy confined to strangers.

18.9. It is sometimes stated that, in England, advantage of a fraud can be taken only by a stranegr to the judgment who is not privy to the fraud, the reasoning being that a party to the proceedings could have applied to vacate the judgment. The theory advanced in this regard is that— (i) a party if guilty, cannot take advantage of his own wrong, and (ii) a party, if innocent, should have pursued the remedy by way of appeal. However, the position on the subject is not entirely beyond doubt.[5] In any case, so far as challenging a decree of *divorce* on the ground of fraud is concerned, English Courts seem to have adopted[6] a liberal attitude on this point, and have not regarded a party to the decree as debarred from claiming relief.[7]

Position in England as to foreign judgment.

18.10. It is well established in England that *foreign judgments* can be impeached on the ground of fraud, [8,9,10,11,12,13] in so far as it affects the jurisdiction of the foreign court.

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[1] See paras. 18:8 to 18:10, *infra*.

[2] *David Kennedy* v. *Dangrid*, (1943) 2 All England Reports 606.

[3] *Coe* v. *Langford*, (1893) 2 Q. B. 376.

[4] *Jonesco* v. *Beard*, (1930) A. C. 298, 300.

[5] See D. M. Gordon, "Actions to set aside judgments" (1961) 73 L. Q. R. 533.

[6] *Bonaparte* v. *Bonaparte*, (1892) Probate 402.

[7] See para. 18:7, *supra* and 18:13, *infra*.

[8] *Aboullof* v. *Oppenheimer*, (1882) 10 Queen's Bench Division 295.

[9] *Vadala* v. *Lawes*, (1890) 25 Queen's Bench Division 310.

[10] *Godd* v. *Delan*, (1905) 92 Law Times 510.

[11] *Hip Foong Hong* v. *Neotia*, (1918) A. C. 888 (Privy Council).

[12] *Ellerman Lines* v. *Read*, (1928) 2 King's Bench 144.

[13] *Syal* v. *Heyward*, (1948) 2 All E. R. 576 (C. A.).

Divorce.

18.11. It is pertinent to point out that it is not denied in English law that fraud is a valid ground for not recognising a foreign *decree* of divorce.[1] Fraud as to the merits of the case decided by the foreign court would ordinarily be ignored in England ; but fraud as to the jurisdiction of the foreign court would be taken into account[2]. The case of *Middleton* v. *Middleton*[3] dealt with both aspects of the matter. In that case, the husband had obtained a decree of divorce in the State of Illinois (U.S.A.) by making two false allegations : first, that he had been resident in the State for over a year, and secondly, that his wife had deserted him.

Both the allegations were false, but were believed by the Illinois court. It was held in England that—

(i) the husband's false evidence as to be matrimonial allegations (desertion in this case) was not a ground for refusal to recognise a decree, but

(ii) his fraud as to the jurisdiction of the Illinois court justified a refusal to recognise the decree in England.

Position as to judgments *in rem*.

18.12. As to the rule[4] that foreign judgments can be set aside for fraud it is sometimes stated that there is a possible exception in England as to judgments *in rem*. Halsbury states[5], for example—

> "In accordance, however, with the general principle that judgments *in rem* are conclusive and binding on all the world, an action here based on fraud in obtaining such judgment will not be entertained so long as the judgment stands in the original country."

However, it should be stated that even this view is not universally accepted. For example, as one writer[6] concludes :

> "There seems no reason why a foreign judgment *in rem* obtained by fraud should be sacrosanct."

Similarly, Dicey[7] states:

> "Any judgment whatever, and therefore any foreign judgment, is, if obtained by fraud, open to attack."

Dicey further remarks[8] that the doctrine "may apply" as between litigants to a judgment *in rem*",—though he acknowledges that there are some doubts whether it vitiates a judgment *in rem* so as to affect the rights of third parties.

In *Mc Alpine's case*[9], the husband obtained a divorce in Wyoming (U.S.A.) by misrepresenting to the Court the wife's address, and by reason of this fraud, the wife had no notice. The divorce was not recognised, for this reason.

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[1]*Bonaparte* v. *Bonaparte*, (1892) Probate 402.

[2]*Middleton* v. *Middleton*, (1966) 1 All E. R. 168. See, for detailed discussion of the case, 29 Modern Law Review 327 and 41 British Year Book of International Studies.

[3]*Middleton* v. *Middleton*, (1966) 1 All E. R. 168.

[4]Para. 18:8, *supra*.

[5]Halsbury, 3rd Edn., Vol. 7, page 148.

[6]Wolff, "Res Judicata in Divorce" U. West, Austl. Ann. L. Rev. Vol. 1 (1948-50), page 369 at pages 373-80 (1948-50), quoted in Pyrles, "Recognition of foreign judgments etc." (1972) 12 I. J. I. L. 31, 44.

[7]Dicey, Conflict of Laws (1967), page 1007.

[8]Dicey, Conflict of Law, (1967), page 1010.

[9]*Mc Alpine* v. *Mc Alpine*, (1957) 3 W.L.R. 698, noted in (1958) 74 L. Q. R. page 8.

IV. FRAUD, PUBLIC POLICY AND NATURAL JUSTICE

Natural justice.

18.13. The categories of fraud and breach of natural justice might sometimes coalesce,—as for example, where the foreign court is deceived by the statement of the petitioner that the whereabouts of the respondent are not known. In such a case, the foreign decree would not be recognised[1], and the legal grounds for non-recognition are two-fold, though the same set of facts gives rise to the two grounds, namely, (i) fraud affecting the jurisdiction of the court; and (ii) breach of natural justice in that respondent, the wife, had no notice.

Fraud—Whether part of public policy.

18.14. At this stage, we may refer to the view sometimes taken on the question whether fraud forms part of public policy. In the Hague convention, public policy is specifically mentioned as a ground of non-recognition. But the convention is silent as to fraud. It appears that, in the discussion on the draft international Convention on recognition of divorces, the delegate from Austria did press for the inclusion of the ground of fraud as constituting a *separate exception* to the general rule of recognition, but their suggestion did not find favour with the Conference, apparently because the practical importance of fraud in Continental countries was not considered to be very great. It is, however, well established in the common law that the judgment of a foreign court procured by fraud is not binding on English courts, and will not be recognised in an English court, even if the judgment is otherwise valid and even if all the other requirements of recognition are satisfied. In view of specific Indian legislative precedents on[2] the subject, it is advisable to mention fraud separately as a ground for non-recognition.

Fraud and natural justice.

18.15. Fraud and breach of natural justice are sometimes taken as connected with each other. In *Middleton's case*[3], the Court observed:

> "Finally, I might mention an old decision which has nothing to do with divorce, but is of some assistance on the attitude of our courts towards *foreign judgments obtained by fraud*[4], and which indicates that the conception of what is contrary to natural justice may be wide enough to cover the present facts. *Oschesenbein c. Papelier*[5], was a case before the Judicature Act, 1873, where the Court of Chancery was asked to grant an injuction to restrain a party, who had obtained judgment for a debt in a foreign court, from bringing an action on the judgment here because the judgment had been obtained by fraud. On appeal, it was held by Lord Selborne L. C. and Mellish L. J. that the injuction could not be granted because a common law court would take cognizance of the fraud.
>
> "The Lord Chancellor said[6]:
>
> > 'I should be sorry to think that anything should fall from this court which might give the least colour to any doubt as to the power of court of law to take cognizance of fraud in obtaining foreign judgments.'
>
> "And Mellish L. J. said[7]:

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[1] *Macalpine* v. *Macalpine*, (1957) 3 All E. R. 134.

[2] Para. 18:2, *supra*.

[3] *Middleton* v. *Middleton* (1906) 1 All E. R. 168, 2 W. L. R. at page 523.

[4] Emphasis added.

[5] *Oschsenbein* v. *Papelier*, (1873) 8 Ch. App. 695.

[6] *Oschsenbein* v. *Papelier*, (1873) 8 Ch. App. 698.

[7] *Oschsenbein* v. *Panelier*, (1873) 8 Ch. App. 700.

> 'It was always held that a foreign judgment could be impeached at law as contrary to the principles of natural justice, as for instance, on the ground of the defendant having had no notice of the foreign action, or not having been summoned, or of want of jurisdiction or that the judgment was fraudulently obtained.'

"The interesting point is that Mellish L. J. treated both want of jurisdiction and obtained a judgment by fraud as instances of a judgment being contrary to the principles of natural justice.

"From these citations I reach the following conclusions:

> 'The rule in *Armitage* v. *Attorney-General*[1] is not an over-riding principle, but is subject to exceptions. One exception is where the decree was obtained by fraud going to the point of jurisdiction. If the rule is as stated in some of the authorities yhsy yhr only exception is where the decree was made in circumstances which offend natural justice or 'substantial justice, the definition of what is contrary to natural justice or substantial justice, is wide enough to cover such a fraud as was perpetrated by the husband in this case.' "

Of course, the same set of facts may amount to fraud as well as to breach of natural justice[2], as we have already pointed out.

Facts must have been discovered since the trial.

18.16. English law permits a domestic judgment to be challenged on the ground of fraud only if the facts upon which the challenging party relies were discovered since the trial[3]. However, this general rule creates some problems in relation to perjury[4].

V. CONCLUSION

Recommendation.

18.17. Having considered all aspects of the matter, we are of the view that—

(a) fraud should be specifically mentioned as a ground for non-recognition, and should not be left to be dealt with under the head of "public policy[4]" or as breach of natural justice[5];

(b) the provision in this regard should be a simple one, as in section 44 of the Evidence Act[6].

CHAPTER 19

ANCILLARY ORDERS

I. INTRODUCTORY

Introductory.

19.1. So far, we have discussed the question of recognition of the principal adjudication as to divorce or legal separation. It is well-known that, in almost every country, when a court orders the dissolution of marriage under a legisla-

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[1] *Armitage* v. *Attorney-General*, (1906) Probate 135.

[2] Para. 18:9, *supra.*

[3] (a) *Duchess of Kigston's case*, 2 Sm. L. C. 754 (12th Ed.)
(b) *Young* v. *Keightly*, (1809) 16 Ves. 348, 33 E. R. 1016.
(c) *Wason* v. *Westminister*, (1861) 4 L. T. 80.

[4] Para. 18:10, *supra.*

[5] Para. 18:11, *supra.*

[6] Para. 18:12, *supra.*

tive enactment, the enactment contains provisions empowering the court to pass orders for maintenance, custody of children, alimony and similar matters. For the sake of convenience, we may refer to these orders as 'ancillary orders',—an expression frequently used[1] in the literature on the subject.

In this Chapter, we shall discuss the question, how far ancillary orders passed in matrimonial proceedings by foreign courts should be recognised.

History.

19.2. The jurisdiction to pass ancillary orders in matrimonial causes has an interesting history, According to common law, the spouses were bound to live together, but, in certain circumstances, a decree of divorce a *mensa at thoro* could be passed by ecclesiastical courts. A learned writer has stated[2] the position in these words—

> "Where the decree was pronounced at the suit of the wife, the mere permission to live separate would not give her adequate relief. By the mere fact of the marriage the whole of her property passed under the control of her husband, and she could not live apart from him unless provided with the means to live. The court, therefore, would pronounce in her favour a decree for alimony as *ancillary* to the decree for separation."

Question to be considered.

19.3. This is the germ from which modern jurisdiction to pass ancillary orders is derived. The precise question to be considered on the subject is, whether such orders passed by foreign courts should be recognised in India. For reasons which we shall indicate in detail later[3], we are of the view that there should be no automatic recognition of ancillary orders passed by a foreign court, even where the grant of divorce, in consequence of which the ancillary order is passed, is required to be recognised under the proposed law.

Findings of fault.

19.3A. Findings of fault also need not be recognised. The finding of a court regarding fault is, of course, different from an ancillary order. But, apart from certain other aspects which will be mentioned later[4], it may be stated that there is no real illogicality in not recognising such finding, because non-recognition of the finding does not affect recognition of the divorce or legal separation. It may also be stated that if the finding of fault is made conclusive, injustice may sometimes arise—for example, where the proceedings in the foreign court were *ex parte*.

Apart from this consideration, the theoretical justification for not recognising the finding of fault is that what the law should recognise is the effect of the determination by the foreign court on status, it being the general policy of the law that in the absence of certain special circumstances, persons who are divorced in one country should not be regarded as married in another country. This policy of the law is satisfied by recognising the decree in so far as it dissolves the marriage, and there is no compelling necessity further to recognise the finding of fault also.

II. PROVISION IN ENGLISH ACT AS TO NON-RECOGNITION OF ANCILLARY ORDER

Section 8(3) of the English Act of 1971.

19.4. At this stage, we may, in order to indicate more precisely what we have in mind, refer to section 8(3) of the English Act of 1971, which reads[5]—

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[1]E. G., see para. 19:2, *infra*.

[2]J. L. Barton, "Enforcement of Financial Provisions, in Graveson (Ed)—A Century of Family Law, pages 352, 353.

[3]Paras 19:10 and 19:11, *infra*.

[4]Paras. 19:4 and 19:11, *infra*.

[5]Section 8(3), English Act of 1971.

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

Principle underlying the English provision.

19.5. The principle underlying this provision in the English Act is that a decree of divorce primarily determines status, and it is not necessary for another country to recognise ancillary orders passed in consequence of the decree, nor is it necessary for that country to recognise the findings of fault. Both these matters are, so far as the foreign country is concerned, unimportant. Moreover, the first belongs to the realm of obligation[1]. As Parker L. J. (as he then was), observed with reference to ancillary orders in general[2],—

> "The application of the foreign law as to *status* does not involve applying the foreign law as to obligation."

It is true that these observations were not made in the context of divorce, but they do apply to divorce. Thus, it has been held[3] that dissolution of a marriage by a foreign court does not put an end to maintenance, even where an English court has made an order for alimony in a suit for judicial separation. It was so held by the Court of Appeal in *Wood* v. *Wood*[4].

English case of *Wood* v. Wood.

19.6. In the English case of *Wood* v. *Wood*[3], referred to above, the Court of Appeal drew a distinction, in regard to divorce law, between, on the one hand, matters of status, and on the other hand, matters of personal right and obligation flowing from a decree. The English court accepted the foreign decree as ending the status of marriage, but did not accept the contention that the foreign decree discharged existing personal rights under the maintenance orders. To that extent—but only to that limited extent—is the doctrine of "divisible divorce" accepted—a doctrine often put forth[5] as a description of the rule under discussion.

In a note on *Wood* v. *Wood* (*supra*), a learned writer observed[6]:—

> "So far as the problem under discussion is concerned, it would seem to be both good law and good policy that an adjudication by the courts of the husband's domicile upon his wife's right to maintenance should not be recognised without possibility of question *simply because the dissolution of the marriage which was the outcome of the same proceedings* would itself be so recognised ..... As a matter of policy, it is scarcely desirable that, regardless of the circumstances, an English court should *in all cases* be compelled to deprive a woman, resident and probably now domiciled in England, who has possibly committed no offence known to English law, of her rights and those of her children under a maintenance order, leaving her to obtain what relief (if any) the court of a possibly distant country has decided to give her in proceedings of which she possibly and reasonably knew nothing."

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[1]-a. Para. 19:6, *infra*.

[2]*Melliss* v. *National Bank of Freece*, (1957) 2 All ER 1:13 (C. A.) 2 All E. R. 1, 13 (C. A.) (per Parker, L. J.).

[3]*Wood* v. *Wood*, (1957) 2 All E. R. 14:24, 29, 100 S. J. 860, reversing (1956) 3 All E. R. 645.

[4]*Wood* v. *Wood* (1957) 2 All E. R. 14.

[5]Para. 19:10, *infra*.

[6]P. B. Carter in (1957) 33 British Year Book of International Law 336.

III. AMERICAN DECISIONS

American cases.

19.7. It may be mentioned that the decision of the Divisional Court in *Wood* v. *Wood*[1], which led to the judgment of the Court of Appeal in the same case to which we have referred above,[2] was the subject of a note by Professor Goodhart in the Law Quarterly Review.[3] In that note, he referred to certain American cases, and particularly to *Estin* v. *Estin*[4],—a decision of the Supreme Court of the United States, and *Vanderbilt* v. *Vanderbilt*.[5]—a decision of the Court of Appeals of New York. (After the note, the decision in *Vanderbilt* was approved by the Supreme Court). The rationale of these decisions is that a court cannot *adjudicate a personal claim* or obligation unless it has jurisdiction over the *person of the defendant.*

In both these American cases[6], the questions before the court were primarily directed to the impact of Article IV, section 1[7], of the Constitution of the United States (commonly called the "full faith and credit clause"), on the law of New York State as expounded or enacted. That article provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State."

American cases.

19.8. In *Estin* v. *Estin*[8],—a judgment of the Supreme Court of the U.S.A.—the wife had obtained, against her husband, a support order (equivalent to our maintenance order), from the New York court, at a time when both parties were domiciled in that state. Later, the husband, having acquired a domicile in Nevada, obtained an "ex parte" decree of divorce. The highest court in New York having (as the majority of the Supreme Court thought) held that its jurisdiction to maintain the support order survived the divorce, the question was whether that conclusion was consistent with the full faith and credit clause of the Constitution.

There was a division of opinion in the Supreme Court, Jackson J., being of opinion that New York was discriminating against a particular kind of decree, an "ex parte" decree, and that it could not do so consistently with the obligation of the full faith and credit clause; Frankfurther, J., however, not being satisfied that the New York Court of Appeals had, in truth, reached the conclusion attributed to it, favoured a reference back to the New York court accordingly.

The view of the majority of the Supreme Court of the U.S.A. in this case rested on the circumstance that the decree was an "ex parte" decree. Taking the view that the highest court in New York had held that a support order could survive such a divorce, and that the support order in the case before them had so survived, they were of opinion, first, that a change in *marital status* did not necessarily involve the result that all the legal *incidents of marriage*—including the quasi-proprietary personal rights of a wife under a support order—were thereby affected; and, secondly, that in the case of an "ex parte" divorce,

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[1]*Wood* v. *Wood* (1956) 3 All E. R. 645 (D. C. on Appeal *Wood* v. *Wood.* (1957) 2 All E. R. 14.

[2]Para. 19:4, *supra.*

[3]Goodhart in (1957) 73 L. Q. R. 29.
On appeal, *Vanderbilt* v. *Vanderbilt,* (1957) 354 U. S. 416, 418.

[4]*Estin* v. *Estin,* (1948) 334 U. S. 541, Para. 19:8, *infra.*

[5]*Vanderbilt* v. *Vanderbilt,* (1956) 135 N. E. 2d 553. (New York Court of Appeals).
On appeals, *Vanderbilt* v. *Vanderbilt,* (1957) 354 U. S. 416, 418.

[6]See discussion in *Wood* v. *Wood,* (1957) 2 All E. R. 14 (C. A.).

[7]Article IV, section 1 of the Constitution of the U. S. A.

[8]*Estin* v. *Estin,* (1948) 334 U. S. 541, 546, 547, 549.

there was nothing offensive to the full faith and credit clause in the view taken by the New York courts that scope of the Nevada decree did not, outside Nevada, extend beyond a *determination of the marriage status.* The majority opinion of the Supreme Court delivered by Douglas J., contained this passage: "Nevada ..... apparently follows the rule that dissolution of the marriage puts an end to a support order." The majority further said that the claim of the husband, if accepted, would involve "nothing less than an attempt by Nevada to restrain (the wife) from asserting her claim under (the judgment) of the New York court.

Principle of American cases.

19.9. We need not discuss *Vanderbilt's case.* But, it clearly emerges from the two cases that, if—to take a hypothetical case—a wife obtains from her husband, (then domiciled in New York), a maintenance order or its equivalent (as by the law of the state she might clearly do), and if, thereafter, her husband acquires an English domicile and obtains an ex parte divorce in England, the courts of the New York State would regard themselves as perfectly free to continue or vary, as they thought fit, their own pre-existing maintenance order, either (i) on the ground that the principle of comity did not require any greater acknowledgment of the "ex parte" English decree than a recognition of the determination of the marriage status, or (ii) on the ground that, since the English decree, on its face, did not purport to do more than determine *the married status* (and particularly did not purport to affect the New York law as to maintenance and the order made thereunder), it was a matter wholly within the competence of the New York courts to decide what, according to their own law, was the effect of the English decree on the position and personal rights of its own citizens (including the children of the marriage).

Thus, the American view as can be deduced from the above decisions and the English view are, in substance, the same.

IV. DIVISIBLE DIVORCE

Collateral orders and 'divisible divorce'.

19.10. It is in this context that the expression "divisible divorce" is often used[1], but, strictly speaking, the expression is not accurate[2]. What is divisible is not the divorce, but the composite order, of which divorce is the occasion.

A right to support normally exists under the marital status, but it is a purely personal right, owed by one spouse to the other as an individual. Though alimony is often awarded as an incident to a divorce decree, it may be granted without divorce, as a decree for separate maintenance. The decree for maintenance thus given does not affect the existence of the marital status; that remains as before, still subject to a divorce action brought at the proper forum. Leflar[3] has explained this aspect.

Leflar then points out[4]:

> "Conversely, a prior alimony award is not always superseded by a later ex parte divorce decree to which the one to whom alimony has been awarded was not a party. It will sometimes be impossible to secure a valid award of alimony in connection with an admittedly valid divorce decree, since the divorce action may proceed *in rem* against the domiciliary marital status, with only the suing plaintiff before the court. The

[1]E.g. See Leflar, Cnflict of Laws (1968), page 551.

[2]Para. 19:6, *supra.*

[3]Leflar, Conflict of Laws (1968), page 551.

[4]Leflar, Conflict of Laws (1968), page 551.

action for alimony must be based either on personal jurisdiction over the defendant sued, or on attachment or garnishment brought against his local property. In such case, the prior decree for separate maintenance still remains in force after the divorce, if the law of the state in which the prior decree was rendered says that it dies[1]."

Provision in the Convention against recognition of finding of fault and ancillary orders.

19.11. In this connection, it may be noted that the second paragraph of Article 1 of the Hague Convention[2] indicates that the Convention is limited to securing recognition of *the fact that the marriage has been dissolved*. The underlying objective, in the minds of most delegations attending the discussions that led to the Convention, was to reduce artificial barriers to the re-marriage of either spouse after divorce. This made them unsympathetic to a German proposal, espoused also by the delegations of Austria, Holland and Belgium, to secure the recognition, under the Convention, of *findings of fault*. This proposal of Germany seemed to ignore the fact that, in different countries with different social conditions, different views may be taken of what amounts to "fault" or whether, indeed, any account should be taken of fault. It may be noted that in some countries, divorce is allowed irrespective of fault, e.g., by mutual consent.

Apart from findings of fault, the delegations were reluctant to extend the Convention to ancillary orders, such as, those relating to maintenance and to the custody of children, partly because of the existence of other Conventions[3] relating to such orders, and partly because of the fear of introducing complications which might prejudice agreement on the essential objectives of the Convention.

Ancillary orders, such as, orders for the payment of maintenance or orders regulating the custody of or access to children, present special problems, because they are seldom final in their effect.

Recommendation not to recognise ancillary orders.

19.12. These were the reasons which explain article 1, second paragraph, of the Convention, and broadly speaking, these reasons justify the inclusion of a specific provision on the subject. For this purpose, section 8(3) of the English Act, which we have already quoted[4], furnishes a suitable precedent. We agree with the principle on which it is based[5], and we recommend that it should be adopted.

V. NEED FOR PROVISION FOR ANCILLARY ORDERS

Effect of recognition of divorce and position as to maintenance.

19.13. Of course, the non-recognition of ancillary orders, which we have recommended above[6], may leave a vacuum[7]. What will be the legal position between the parties on matters on which ancillary orders were or could have been passed ? Such problems can arise. The difficulty is illustrated by the English case of *Torok* v. *Torok*[8], which we shall discuss later[9].

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[1]*Estin* v. *Estin*, (1948) 334 U. S. 541.

[2]Article 1, second paragraph of the Hague Convention.

[3]E. g., (a) the Convention of October 24, 1956, on the law applicable to alimony obligations towards children, and

(b) the Convention of April 15, 1958, relating to the recognition and execution of decisions concerning alimentary obligations towards children.

[4]Para. 19·4, *supra*.

[5]Para. 19·5, *supra*.

[6]Para. 19·12, *supra*.

[7]See also para. 19·15, *supra*.

[8]*Torok* v. *Torok*, (1973) All England Reports 101, (1973) 1 Weekly Law Reports, 1066.

[9]See para. 19·24, *infra*.

Outline of provision needed to empower Indian Court to pass appropriate order.

19.14. We may, at this stage, state briefly, in outline, the provision that is needed to empower Indian Courts to pass appropriate orders[1]. Where the foreign divorce or judicial separation is recognised by virtue of the proposed new Act, then, whether the foreign court has or has not passed orders for the maintenance of either party, or orders for the custody, education or maintenance of the children of the marriage, or orders for the disposal of any property of either of the parties or their joint property, or other ancillary orders, either party may apply to the competent court for passing ancillary orders.

In this context, the "competent court" will mean the court—

(a) which, under any law for the time being in force, would have been competent to try a proceeding for divorce or judicial separation, as the case may be, if such a proceeding had been instituted on the date on which the present application is filed, by the party now applying for an ancillary order, on a ground available under that law, and

(b) which, under such law, would have power to pass such ancillary order, (that is, the ancillary order now applied for), on or after termination of the proceedings for divorce or judicial separation.

19.15. The need for such a provision arises by reason of the combined operation of the following two factors:—

(a) The divorce granted by the foreign court is to be recognised under the proposed law, and the parties would no longer be husband and wife.

(b) At the same time, since the proposed law is going to provide[2] (in effect) that the ancillary order passed by the foreign court may not be recognised, the ancillary order will be of no consequence in India.

The result will be that there will be an hiatus[3], in regard to matters governed by ancillary orders. It is in order to fill up this hiatus that a provision of the nature suggested above[4] is needed.

VI. PROVISIONS IN VARIOUS ACTS AS TO MAINTENANCE AND CUSTODY

Existing statutes maintenance.

19.16. It may be mentioned in this connection that the existing provisions of Indian statute law may not over all aspects of the situation. For example, as regards maintenance, the Hindu Adoption and Maintenance Act, 1956, and section 125 of the Code of Criminal Procedure, 1973—to take two important provisions—would not cover the case, since, after a *judicial* divorce, neither of these two legislative provisions applies. Thus, section 18 of the Hindu Adoption and Maintenance Act, 1956, provides for the maintenance of a 'Hindu wife' —which expression would not be applicable after a legally recognised foreign divorce. Section 125 of the Code of 1973 is not meant for a wife divorced judicially. Nor would it be possible to resort to any supposed common law doctrine imposing an obligation to maintain, because, once the marriage is regarded as having been lawfully terminated, there is no such obligation to maintain the ex-wife at common law.

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[1]This is not a draft section.

[2]Para. 19:12, *supra*.

[3]Para. 19:13, *supra*.

[4]Para. 19:14, *supra*.

Custody.

19.17. Similarly, as regards the custody etc. of minor children, the other Central Acts will not cover the situation. An application for the appointment of a guardian of the person can, for example, be made under the Guardians and Wards Act, 1890, and orders for custody can also be passed under that Act in certain circumstances, but that Act is not framed with the object of dealing with the situation arising on dissolution of the marriage. Same applies to the Hindu Minority etc. Act, 1956. Moreover, because of the very restrictive provisions contained in the various Acts,—e.g. section 6, Hindu Minority and Guardianship Act[1], 1956, and section 19, Guardians and Wards Act[2], 1890,—certain difficulties arise. These difficulties are illustrated by a few reported cases[3-8].

Provision in Guardians etc. Act.

19.18. In this connection, we may quote section 19 of the Guardians and Wards Act, 1890, which provides as follows:—

> "19. Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a *guardian of the person*—
>
> (a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or
>
> (b) *of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or*
>
> (c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor."

Clause (b) of the section is of particular relevance.

Hindu law as to guardianship.

19.19. In the Hindu Minority and Guardianship Act, 1956, section 6 provides (in effect), that the father has a preferential right to *guardianship*, though the mother has the preferential right to *custody* upto a certain age. By section 19(b) of the Guardians and Wards Act, 1890, (quoted above)[9], it is enacted, in substance, that the Act does not authorise the court to appoint or declare a guardian of the person of a minor whose father is living, if the father is not, in opinion of the court, *unfit to be the guardian of the person of the minor*. These two provisions are slightly weighted in favour of the father. But, section 26 of the Hindu Marriage Act, 1955, which deals with orders for the custody etc., of the children in the course of, or on the termination of, the matrimonial proceedings under the Act, is on a different line. Under that section, the court may make such orders with respect to the custody, maintenance and education of minor children, as it may deem just and proper, consistently with the wishes of the child wherever possible.

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[1]Para. 19:19, *infra.*

[2]Para. 19:18, *infra.*

[3]*Captain Rattan Amrit Singh* v. *Kamaljit*, A. I. R. 1961, Punj. 51.

[4]*Sunil Kumar* v. *Satirani*, A. I. R. 1969 Cal. 573.

[5]*Kamalakshmi Amma* v. *Bhaskar Menon*, A. I. R. 1961 Kerala 154, 155, para. 2.

[6]*Raghavan Nayar* v. *Lakshmi Kutti*, A. I. R. 1961 Ker. 193.

[7]*Kusa Parida* v. *Vaishnab*, A. I. R. 1966 Orissa, 60

[8]*Avinash Devi* v. *Dr. Khazan Singh*, A. I. R. 1962 Punj. 326; Para. 19.19, *infra.*

[9]*Para* 19·18, *supra.*

The contrast between the Hindu Marriage Act and the Acts relating to guardians was noted in a punjab case[1]. It was pointed out that the section in the Hindu Marriage Act introduces no restriction, (in contrast with the provisions in the Guardians and Wards Act, or the Hindu Minority etc. Act) as to the orders that can be passed, and gives no special status to the minor's father.

Case law

19.20. The shift in emphasis in the various statutory provisions is also illustrated by a Calcutta case[2]. In that case, S. K. Chakravarti, J. held that though under section 19 of the Guardians and Wards Act, 1890, if the father is not unfit to be the guardian of the person of a minor aged more than 5 years, the father should be the guardian,[3] still, under section 13 of the Hindu Minority and Guardianship Act, the prime and sole consideration will be the welfare of the minor. Section 19 of the Guardians and Wards Act, 1890, will, therefore, have to be read subject to section 13 of the Hindu Minority and Guardianship Act, 1956, so far as Hindus are concerned.

P. N. Mookerjee, J. discussing the point at still greater length, held that section 13 of the Hindu Minority and Guardianship Act had brought about a material change, so far as Hindus were concerned. It made it quite clear, that in all cases, *irrespective of the status of the person* claiming the guardianship, the welfare of the minor would be the paramount consideration. He held that under the Guardians and Wards Act, so far as the *father* is concerned, *his claim for guardianship* in the case of a boy of more than 5 years of age *would be the paramount consideration.* In regard to *other persons* claiming guardianship, the said Act put the welfare of the minor in the forefront, and made it the paramount consideration. He also added that the welfare of the minor, though not the paramount consideration in cases coming under section 19, is not altogether without significance. It will be one of the considerations, or one of the facts, to be considered in the matter of the claim of guardianship, even of the father, and as one of such considerations, it may, in the ultimate result, outweigh the otherwise paramount claim of the father.

19.21. No doubt, the various provisions still leave a discretion to the Court, and, with a change in social concepts, a change in judicial attitude can be anticipated. Recently, for example, the Supreme Court has pointed out the need to have regard to the special circumstances under which the mother could be held to be the natural guardian.[4]

U. N. Convention.

19.22. It may be noted that the U.N. Commission on the Status of Women[5] recommended the following provisions as to rights of women in regard to guardianship:

(a) Women shall have equal rights and duties with men in respect to guardianship of their minor children and the exercise of parental authority over them, including care, custody, education and maintenance;

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[1] *Avinash Devi* v. *Dr. Khazan Singh*, A. I. R. 1962 Punj. 326; 62 Punj. L. Reporter 354 (A. N Grover J.).

[2] *Sunil Kumar* v. *Sati Rani*, A. I. R. 1969 Cal. 573, 575, 577, paragraphs 10 and 13 (P. N. Mookerjee and S. K. Chakravarti, JJ.).

[3] *Birula Bala*, (1961) 65 Cal. "N. 1138; I. L. R. (1961)" 2 Cal. 40, referred to.

[4] *Jija Bai* v. *Pathan Khan*, A. I. R. 1971 S. C. 315.

[5] 20th Session, 13th February to 6th March, 1967 (U. N. Commission on Status of Women).

(b) Both spouses shall have equal rights and duties with regard to the administration of the property of their minor children, with the legal limitations necessary to ensure as far as possible that it is administered in the interest of the children.

(c) The interest of the children shall be paramount *consideration in proceedings regarding custody of children in the event of divorce, annulment of marriage or judicial separation.*

(d) No discrimination shall be made between men and women with regard to decisions regarding custody of children and guardianship or other parental rights in the event of divorce, annulment of marriage or judicial separation.

This also shows the changed social attitude. Nevertheless, the weightage in favour of the father is obvious under the Guardians and Wards Act[1].

Hindu Marriage Act.

19.23. So much as regards the various statutory provisions relevant to guardianship. We may now note that sections 25-26 of the Hindu Marriage Act, which provide, *inter alia,* for orders as to custody etc., cannot be resorted to in connection with a *foreign divorce,* unless we provide for it. It has been held[2] that the provisions of the Hindu Marriage Act can be resorted to by the court only if the marriage is dissolved *under the Hindu Marriage Act,* and *not* if the marriage is dissolved under any other Act, such as the Madras Aliyasanthana Act.

Section 15 of the Madras Marumakkathayam Act, 1932, provided that—

"the mother shall be the guardian of the person and property of her minor children if their father is dead or the marriage of their parents is dissolved."

It was held that only this provision would govern the parties, where the divorce was obtained under that Act.

VII. ENGLISH CASE OF TOROK

English case of *Torok* v. *Torok.*

19.24. The above discussion shows the need for a provision that would take care of matters normally dealt with by ancillary orders in matrimonial causes. The need for some specific provision as to ancillary orders in the proposed law is illustrated by the English case of *Torok* v. *Torok*[3]. In that case, the parties left Hungary at the time of the Hungarian rising in 1956, and came to the United Kingdom. They married, became naturalised British subjects, and lived in England together with their children until the husband left the wife in 1967 and went to live in Canada. The wife and the children continued to live in England, in a house of which the parties were the joint owners. In 1972, the husband, who, by the laws of Hungary, was still a national of that country, brought proceedings in a Hungarian court for divorce based on the ground that the parties had lived apart for 5 years. The wife entered an appearance. The Hungarian court pronounced a "partial decree" of divorce, and the wife gave notice of and lodged an appeal in Hungary against the pronouncement of the decree.

19.25. The wife also petitioned *in England,* for divorce. Since the English courts would recognise the Hungarian decree *if it was made final,* under sec-

[1]Para. 19:18, *supra.*

[2]*Prema* v. *M. Anad Shetty,* A. I. R. 1973 Mysore 69, 71, para. 17 (Dissolution under the Madras Aliyasanthana Act).

[3]*Torok* v. *Torok* (1973) 1 W.L.R. 1066.

tions 3(1) and 5(1) of the Recognition of Divorces and Legal Separations Act, 1971[1], and the court would then have no jurisdiction, under the Matrimonial Proceedings and Property Act, 1970, *to make orders concerning property and financial provision* for the wife, the wife petitioned for a divorce under section 2(1)(e) of the Divorce Reform Act, 1969 (which was the law then in force). She also prayed for exercise of the discretion of the Court to expedite the making of the decree absolute.

On the question whether the court should grant a decree and exercise its discretion to expedite the making of the decree absolute, it was held, granting a decree, that the English court had jurisdiction on the wife's petition to grant a decree of divorce and there was no ground on which it could refuse to do so; that, since the court had jurisdiction only under the Matrimonial Proceedings and Property Act, 1970 if a decree had been granted by an English court, the wife would be disabled from using or taking advantage of that Act if the Hungarian decree were made final before the English decree was made absolute and, accordingly, since she would thereby suffer a severe injustice and the husband no injustice if the decree absolute was expedited, the decree would be made absolute forthwith.

Observations made in the English case.

19.26. In this way, substantial justice was done. The Court, however, observed[2] that the situation presented in the case—relating to two people, who had been living in England, with children who had been brought up in England, and with a matrimonial home in England,—was unforeseen when the Recognition of Divorces and Legal Separation Act, 1971 was drafted; because the effect of the Act is to oust, in effect, the jurisdiction of the English court to deal with a family living in England and with property in England (if the foreign divorce is one which has to be recognised under the Act).

Fortunately, in this case, the foreign divorce had not yet become final. But, if it had become final, the situation would have been hard. The need for a specific provision is illustrated by the facts of this case. Such a situation could arise in India, or, for that matter, in any country, if a couple divorced elsewhere comes back to that country or if even one of the spouses, so divorced, comes back.

VIII. RECOMMENDATIONS

Recommendation as to orders for maintenance etc.

19.27. In view of what we have stated in the above discussion, we recommend that a provision of the nature already suggested[3], empowering the appropriate Indian Court to pass orders as to maintenance etc. and other ancillary matters discussed above should be inserted in the proposed law. What we have suggested above is, of course, not a draft section, but it gives all the essential requisites thereof.

This provision will be in addition, of course, to the provision for non-recognition[4] of the foreign ancillary order.

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[1]Recognition of Divorces and Legal Separations Act, 1971, section 3(1).

[2]*Torok* v. *Torok*, (1973), 1 W. L. R. 1066, page 1069, portion H, page 1070, portions A-B.

[3]Para. 19.14, *supra*.

[4]Para. 19.12, *supra*.

CHAPTER 20

ORDERS FOR CUSTODY

VARIATION BY THE MATRIMONIAL COURT

I. INTRODUCTORY

Conflict between order of the matrimonial Court and order under the Guardians & Wards Act.

20.1. In the course of our consideration of the subject of ancillary orders[1] we had occasion to consider the question whether an order for the guardianship of the person under the Guardians & Wards Act, 1890, would be subject to an order passed later by a court which exercises matrimonial jurisdiction and passes an ancillary order in regard to custody, education and maintenance of children. In other words, can a matrimonial court pass an order modifying an earlier order passed by a competent court under the Guardians and wards Act as to the custody of children? Or, the order earlier passed by the Court competent under the Guardians and Wards Act, must hold the field—subject, of course, to variation by that very Court? This was the question raised for our consideration.

Section 26, Hindu Marriage Act, 1955.

20.2. A typical provision empowering the matrimonial court to pass orders for custody of children is in section 26 of the Hindu Marriage Act, quoted below:

> "26. In any proceeding under this Act, the Court may, from time to time, pass such interim orders and made such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made."[2]

20.3. In order to enable us to consider the issues raised by the query, we studied the legal position on the matter and on an examination thereof, ultimately come to the conclusion that it falls outside the scope of the present Report.

However, we thought that since we have studied the matter, and since the matter is of some importance and may fall to be considered by the Commission in the future, it would not be inappropriate if we state below, in brief, the question, the legal issues raised thereby and the present position.

General nature of the question.

20.4. We may, at the outset, point out that the matter is really of a general nature, and is not confined to the Guardians and Wards Act. The query was raised with reference to the Guardians and Wards Act, but it really involves a wider question relating to the competence of the matrimonial court to modify previous orders as to custody passed by other courts by virtue of powers conferred by the relevant Acts. Law conferring such a power is not to be found in any single enactment. We are mentioning this aspect because if, in the future, further legislation is contemplated, this aspect will be of some importance in coming to a conclusion as to whether further legislation is needed. Even if further legislation is considered proper, it cannot *prima facie*, take the shape of a provision in a law relating to the recognition of foreign divorces.

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[1]Chapter 19, *supra*.

[2]Section 26, Hindu Marriage Act, 1955.

Guardianship and cutody.

20.5. It may also be stated that matrimonial legislation in India is not contained in one enactment, but is to be found in several enactments. We need not respect all that we have already stated on the subject earlier[1] in this Report.

Before we deal with the relevant legal provisions, we may also make it clear that guardianship and custody are not identical concepts. The guardian may well not have the custody and yet, by virtue of his guardianship, he may still exercise powers regarding marriage and education. "Guardianship is certainly a more comprehensive and more valuable right than mere custody."[1-a] Though under section 24 of the Guardians and Wards Act, the guardian is charged with custody[2], the two concepts are not identical.

After these introductory observations, we shall consider the present law.

II. PRESENT LAW

Various provisions.

20.6. Proceedings concerning custody, or guardianship of the person, or both, fall under a variety of legislative or other provisions and can be instituted in a variety of modes. Amongst these are:—

(i) The Guardians and Wards Act, 1890;

(ii) The Hindu Minority and Guardianship Act, 1956;

(iii) The provisions of sections 97 and 98 of the Code of Criminal Procedure, 1973;

(iv) The writ of habeas corpus;

(v) The original jurisdiction of the Chartered High Courts to appoint guardians;

(vi) Suit in a civil court;

(vii) Matrimonial legislation, such as, section 26 of the Hindu Marriage Act, 1955 and comparable legal provisions.[3]

The precise question to be considered in this Chapter raises the issue as to how far an order under (vii) above can modify an order under (i) to (vi) above.

"Wardship" of a court *under state legislation* is another institution of the law. Under the relevant State Act, a minor may, by appropriate action, be made a ward of court under the provisions of that Act. However, in most cases, orders made under those Acts do not, in practice, affect the control of the person of the minor, and we shall not therefore go into those Acts.

Guardians and Wards etc., Act.

20.7. Coming to guardianship of the person, we may state that such guardianship of the minor is governed by the relevant rules of personal law. But, under certain conditions, it can be conferred by the court in proceedings for guardianship. The principal Act on the subject is the Guardians and Wards Act, 1890. We have, in an earlier Chapter[4], already discussed its provisions, so far as they are material for the purposes of this Report.

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[1]Chapter 5, *supra*.

[1-a]*Kumaraswamy v. Rajammal*, A. I. R. 1957 Mad. 563, 567, Para. 13.

[2]Section 24, Guardians and Wards Act, 1890.

[3]Para. 20:2, *supra*.

[4]Chapter 19, *supra*.

For the present purpose, it will suffice to state that under section 7 of that Act, the court may appoint a person as the guardian of the person or property of a minor. The court must be satisfied that such appointment will be for the welfare of the minor. But this appointment cannot disturb the guardianship of a person who has been appointed by a will or by other instrument or by the court or who has been declared by a court.

As to the award of custody, the jurisdiction of the court under section 25 of the Guardians & Wards Act arises only where the application is for an order for the return of the ward to the custody of the guardian and where it is alleged that the ward has left or is removed from the custody of the guardian. The order for the return is made only if the minor should be made to return from the point of view of the minor's welfare.[1]

Hindu minority etc. Act.

20.8. The Hindu Minority and Guardianship Act, 1956, is primarily concerned with natural guardians, and not with appointment by the court, though section 13, which deals with the principles for appointing guardians, is so worded as to apply also to guardians *appointed by the court.*

As to natural guardians, section 6, so far as is material, provides that the natural guardians of a Hindu minor in respect of his person are:—

(a) in the case of a boy or an unmarried girl—the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;

(c) in the case of a married girl—the husband.

Under the uncodified Hindu law, where natural guardians are not alive, recourse for the appointment of the guardian[2-3] must be had to the court as representing the rights of the King. The principle that the appointment of a guardian rests with the ruling power is, thus, not unknown to Hindu law.[4] In modern times, this jurisdiction is exercised under the Guardians and Wards Act, the provisions whereof have been expressly saved by the Hindu Minority etc. Act.

Code of Criminal Procedure.

20.9. The provisions of the Code of Criminal Procedure, 1973—sections 97 and 98—empower the competent Magistrate to pass orders for custody in certain cases. These sections are meant principally for cases of abducted persons and persons illegally detained for an improper purpose.

Habeas corpus.

20.10. The writ of habeas corpus is sometimes resorted to for obtaining orders as to custody of minors. The underlying principle[5] it the protection and well-being of the person brought before the court.[6]

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[1] See—

(a) *Rosy Jacob* v. *Jacob*, A. I. R. 1973, S. C. 2090;
(b) *Pemela Williams* v. *Patrick Martins*, A. I. R. 1970 Mad. 427.

[2] *Gulbai*, In re. I. L. R. 32 Bom. 560.

[3] *Thayammal* v. *Kuppanna*, (1915) I. L. R. 38 Mad. 1125, 1126 (Sadasiva Ayyar, J.).

[4] See the passage from Mc. Naghten's Precedents and Principles of Hindu Law, quoted in *Chennapa* v. *Chennapa*, A. I. R. 1940 Mad. 140 (Leach, C. J.).

[5] *Sarabibi* v. *Abdul Razzak*, (1911) 12 Bom. L. R. 891.

[6] *Gohar Begum* v. *Suggi*, A. I. R. 1960 S. C. 93, 96, Para. 10.

At common law, once out of a father's or guardian's control, a minor could be resorted only by the issue of a writ of habeas corpus requiring the person in charge of the minor to produce him and justify his detention. If the child were over the age of discretion (fourteen for boys and sixteen for girls), a writ would not issue to the father or guardian as a matter of right against the wishes of the minor.[1]

In India also, the guardian is entitled to custody of the person of the minor, which he may vindicate either by a writ of habeas corpus or by an application under section 25 of the Guardians and Wards Act, 1890, unless his rights are modified by special law or by an order of the court.

Chartered High Courts.

20.11. Then, in the exercise of its special jurisdiction, a Chartered High Court may make any order it thinks fit in the matter of the guardianship of a minor. The Chartered High Courts have special or inherent jurisdiction conferred upon them by their Charters or Letters Patents, which no other Courts possess. They enjoy such jurisdiction apart from the Guardians and Wards Act, 1890, that is to say, in addition to the jurisdiction conferred by that Act upon a High Court in its ordinary civil jurisdiction.

We are referring to these High Courts as Chartered High Courts, because they have this jurisdiction by virtue of their Charter or Letters Patent.

The jurisdiction referred to above is wide. For example, it is now well-settled that under Hindu law, a guardian cannot properly be appointed in respect of the infant's interest, in the property of an undivided Mitakshara family[2]. But the Chartered High Courts can exercise this power.

This jurisdiction stands expressly saved by section 3 of the Guardians and Wards Act, 1890, in the case of the High Courts established under the statute, the High Courts Act (24 and 25 Vic. c. 104).

It was provided by section 9 of the High Court Act[3] that the High Court shall exercise all such powers as shall be granted by the Letters Patent, and, except as otherwise provided therein, it shall have and exercise all jurisdiction vested in the Supreme and Sudder Courts. Clause 17 of the Letters Patent of 1865, stated that the High Court shall have the like power with respect to infants and other in the province as was vested in the High Court immediately prior to the publication of the Letters Patent, i.e., the power that it had under clause 16 of the Letters Patent of 1862, which had stated that the Court should have the same jurisdiction as was then vested in the Supreme Court. The powers vested in the Supreme Court were the same as those possessed by the Courts of Chancery in England—See clause 25 of the Charter of 1774, establishing the Supreme Court at Fort William, Clause 32 of the Charter of 1800, constituting the Supreme Court at Madras and Clause of the Charter of 1823 relating to the Supreme Court at Bombay.

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[1] *See*—
(a) *R. v. Clarke*, Re Race, (1857) 119 E. R. 1217;
(b) *R. v. Hawes ex p. Barford*, (1860) 3 E & E. 332;
(c) *R. v. Greenhill*, (1836) 111 E. R. 922, 927.

[2] *Gharibullah v. Khalap Singh*, (1903) I. L. R. 25 All. 407; L. R. 30 I. A. 165 (P. C.)

[3] The High Courts Act, 24 & 25 Vic, c. 104.

As was observed by the Madras High Court in *Annie Besant* v. *Narayaniah*[1], "the jurisdiction in connection with the estates and persons of minors is ..... the jurisdiction which was exercisable by the Lord Chancellor in England acting for the sovereign as parens patriae, when the Supreme Court ..... was instituted."

In England, the Court of Chancery has always had the power of appointing guardians for infants on a proper case being made, whether such infants have property or not.[2-3]

Wardship.

20.12. This jurisdiction is often referred to as jurisdiction to make a person "ward of court". Wardship of court differs from other types of orders, inasmuch as if a child is made a ward of court, the custody *vests in the court.* Of course, for practical reasons, care and control of the child is given to an individual—it can, in appropriate cases, be given to a local authority in modern times, but the person or authority so placed in charge will be in the nature of an agent of the court, responsible solely for the day-to-day supervision of the ward. He or it must keep the court informed of the progress of the case, and may always turn to the court for guidance and assistance.[4]

Being a jurisdiction flowing from the Crown's prerogative and exercisable on the merits of each individual case, the jurisdiction transcends purely territorial limits as well as difference of race.

Latey J.[5] traces the origin of this wardship jurisdiction as follows :

> "All subjects owe allegiance to the Crown. The Crown has a duty to protect its subjects. This is and always has been specially so towards minors, that is to say, now the young under the age of 18. And it is so because children are especially vulnerable. They have not formed the defences inside themselves which other people have, and therefore, need special protection. They are also a country's most valuable asset for the future. So the Crown as parens patriae delegated its powers and duty of protection to the Courts."

20.13. Thus, it has been held that the original side of the Calcutta High Court[6] has jurisdiction to entertain an application for the appointment of a guardian of the person of a minor who ordinarily resides within *its ordinary original civil jurisdiction* as also those resident within the Bengal Division of the Presidency who are "British subjects". The jurisdiction over infants under clause 17 of the Letters Patent, preserved by section 3 of the Guardians and Wards Act, is operative on the person and estate of all infants within Bengal Division of the Presidency[7] in regard to British subjects.

The Guardians and Wards Act does not take away this special jurisdiction of the High Court. Section 3 of the Act provides that "nothing in this Act shall be construed to affect or take away power possessed by any High Court established under the Statutes 24 and 25 Victoria, Chapter 104. (An Act for

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[1]*Annie Besant* v. *Narayaniah*, (1913) 25 M. L. J. 661, 686 A.I.R. 1915 Mad. 157 (White, C. J. and Oldfield, J.).

[2]*Re Spence*, 2 Phil. 247, 252.

[3]*Re Flynn*, 2 De G. & Sm. 457, 481 N.I.C.

[4]*See* Cross, "Wards of Court" 83 L.Q.R. 201.

[5]*Rex (a minor)*, (1975) 1 All. E. R., 697.

[6]*In the matter of Lovejoy Patell*, I.L.R. (1943) 2 Cal. 554; A.I.R. 1944 Cal. 433, 438, 439 (Das, J.).

[7]*In re Taruchandra Ghose*, A.I.R. 1930 Cal. 598 (Lort Williams, J.).

establishing High Courts of Judicature in India)." The power is also saved by the Hindu Minority and Guardianship Act.[1]

Chartered High Courts.

20.14. Subject to the paramount consideration being the welfare of the minor and his estate, a chartered High Court may, in the exercise of its special jurisdiction referred to above make any order which it deems fit.[2] Its jurisdiction being independent of the Guardians and Wards Act, a chartered High Court is not restricted by the specific provisions of that Act.

Suits for custody.

20.15. Apart from proceedings of the nature mentioned above, it would appear that a suit can be filed for custody. How far such a suit can be filed by the father is a matter for controversy. According to the Bombay view[3], a suit by a father for the custody of his child is maintainable, especially since because of section 19 of the Guardians and Wards Act, no remedy at the instance of the father exists under that Act.

According to the Madras High Court[4], on the other hand, a mofussil Court *other than the District Court* has no jurisdiction to entertain a suit by a father for the custody of his minor child.

We need not go into further details of this controversy. But the proposition that in certain circumstances a suit for custody can lie, is not in dispute. Such a suit is expressly mentioned in the Provincial Small Causes Courts Act.[5]

Ancillary orders in matrimonial cases.

20.16. Finally, matrimonial legislation usually contains provisions empowering the court to pass orders for the custody of children of the marriage both during the pendency and on the termination of matrimonial proceedings. When matrimonial relief is decreed, custody is granted specifically by the court as a concomitant to such relief, on such relief, on such terms as the court may deem just. An example in point is the provision[6] in section 26, Hindu Marriage Act, 1955.

III. VARIETY OF DISPUTES

Variety of disputes.

20.17. This brief resume of provisions empowering the court to deal with the custody of children, shows the variety of powers possessed by various courts. It may also be stated that legal disputes concerning children are of many kinds, and may arise—(i) independently, or (ii) pending matrimonial proceedings, or (iii) in the aftermath of matrimonial proceedings between the parents. The dispute itself may be between the parents themselves, or between the parents (united or divided) and the third parties like in-laws, and grand-parents. Its subject matter can be the question who is best suited or placed to bring up a child, or merely a specific point of disagreement,—for example, over access education or maintenance.[7]

Custody—a divisible right.

20.18. "Custody" is a divisible right, which enables a court, in proceedings relating to a child, to make an order for custody subject to qualifications, or to divide the rights inherent in custody between the parents or other parties for

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[1] *See* section 12, Hindu Minority and Guardianship Act, 1956.

[2] *Raja of Vizianagaram* v. *The Secretary of State for India*, I. L. R. (1937) Mad. 383; A.I.R. 1937 Mad. 51, 76.

[3] *Acharajlal* v. *Chimanlal*, (1916) I.L.R. 40 Bom. 600, 605.

[4] *Sathi* v. *Ramandi*, 1919 I.L.R. 42 Mad. 647; 37 M. L. J. 93, A.I.R. 1920 Mad. 937 (F. B.).

[5] *See* Provincial Small Causes Courts Act, 1887, Article 37—"A suit for.....custody of a minor".

[6] *See* Chapter 19, *supra*, and the opening paragraphs of this Chapter.

[7] Grant, Family Law (1970), pages 132, 133.

example, by giving custody to A subject to care and control to B, or custody to A and B subject to care and control to A or B or even C. These permutations enable a court to give both parents, and other persons who may be concerned, a share or stake in the upbringing of a child where such arrangement is likely to be of benefit[1].

IV. POWERS OF THE MATRIMONIAL COURT

Statutory provision.

20.19. We now come to the specific question to be considered in this Chapter, namely, the extent of power of the matrimonial court to modify an earlier order passed by a court under the Guardians and Wards Act, 1890. The statutory provisions relating to the matrimonial courts competent under the various enactments are silent in this regard, inasmuch as they do not specifically permit the matrimonial court to vary an earlier order of another court, nor do they prohibit it from doing so.

Case law.

20.20. So far as we could ascertain, the question whether the matrimonial court can vary an order passed by the guardianship court does not appear to have arisen in any reported case under Indian matrimonial legislation.

Of course, the power of a guardianship court to vary its earlier order is well recognised.

Orders as to the custody of a child under the Guardians etc. Act are always of a temporary nature. Those interested in the minor are at liberty to apply to the Court for modifications or alteration of such order whenever necessity arises.[2-3]

Similarly, the power of a matrimonial court to vary its own order is not disputed. In a Calcutta case[4] between Parsis, it was laid down that merely because of an ancillary order passed in matrimonial proceedings,[5] the father has been given the custody of the children and there is nothing against him so far as the children are concerned, it cannot be said that he has an absolute overriding right in the matter of custody of the children. In this case, an order for custody was passed in a suit in which judicial separation had been granted to the wife.

Necessity for review of the order arose, it seems, because of some differences of opinion between the parents as to the school in which the children should be educated. Taking the view that the earlier order could be reviewed, the High Court pointed out that under section 49 of the Parsi Marriage and Divorce Act, the position would have to be considered in the light of all the circumstances and in the context of the children's welfare.

English cases.

20.21. The question dealt with in this Chapter does not appear to have directly arisen in any English case also, although caselaw is available as to the power of the High Court to vary an earlier Magisterial order. In one case, the High Court, in exercise of its wardship jurisdiction, was asked to modify an order

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[1] *In re. N.* (1967) 1 W.L.R. 479, the Court of Appeal approved of a care and control order to one party, without any other order for custody.

[2] *Sareswati Sripad*, I.L.R. (1941) Bom. 455; 43 Bom. L. R. 791; A.I.R. 1941 Bom. 103.

[3] *Rattan Amoh Singh* v. *Kamaljit Kaur*, A. I. R. 1961 Punj. 51, 54, Para. 17.

[4] *Jambhed* v. *Zerin*, A.I.R. 1974 Cal. 111, 114, 115, paragraphs 15 and 18 (S. K. Mukherjee and S. K. Dutta, JJ.).

[5] Section 49, Parsi Marriage and Divorce Act, 1936.

(*Chapter 20.—Orders for Custody—Variation by the Matrimonial Court. Chapter 21.—Modification of section 13, Code of Civil Procedure and section 41, Evidence Act*)

made earlier by the Magistrate's Court.[1] Stamp J. held that although he undoubtedly held jurisdiction to hear the case, he should exercise it only in exceptional circumstances.

It would appear that such jurisdiction could be exercised by the High Court where the case had special complexity[2] or where the jurisdiction of the High Court is more extensive, efficacious or convenient, or where it is necessary to supplement the order passed by the Magistrate by giving relief which the Magistrate had no power to give. It may be noted that in the exercise of the wardship jurisdiction, the High Court may issue an injunction prohibiting a person from taking the child out of the jurisdiction. In one English case,[3] such an order was passed by the High Court to give effect to the Magistrate's order awarding custody to the mother.

V. CONCLUSION

Two views possible.

20.22. Since the case law throws no light on the question which we are now investigating, the question is of first impression and had to be so approached. Now, it would appear that two veiws are possible on this question. On the one hand, the order passed earlier under the Guardians and Wards Act or other cognate provision would have been passed on a consideration of the state of affairs then existing. If there is a material change of circumstances by reason of the dissolution of marriage or by the grant of judicial separation, a new factual element is introduced, which at least requires consideration by the matrimonial court. On this reasoning it could be argued that the jurisdiction of that court should be treated as wide enough so as to enable it to take into account the factual element just now referred to. On the other hand, a fresh order would mean a modification of the order of another court, and since, *prima facie*, the section is silent on the subject, it can be argued that it does not permit of any such course.

It is not necessary for us to express any opinion on the question, since, in any case, the matter falls outside the scope of this Report. If and when the question comes up for consideration, several aspects may have to be borne in mind. The brief discussion in this Chapter of the legal issues will serve to indicate broadly the scope and magnitude of the problem. But, as we have already indicated, this problem is outside the scope of this Report.

CHAPTER 21

MODIFICATION OF SECTION 13, CODE OF CIVIL PROCEDURE AND SECTION 41, EVIDENCE ACT

Modification of section 13, C.P.C. and section 41, Evidence Act.

21.1. Our recommendations will cover many matters which are, at present, touched upon by certain statutory provisions[4] to which we have already made a reference. It is necessary, as a consequential amendment, to modify those provisions,—namely, section 13, Code of Civil Procedure, 1908, and section 41, Evidence Act, 1871,—so as to exclude their application in relation to the matters that will be covered by our recommendations, when they are given legislative effect.

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[1] *Re. P.*, (1967) 2 All E. R. 229.
[2] *Re. P.* (1968) 1 W.L.R. 1976.
[3] *Re H.*, (1966) 1 All E. R. 952.
[4] Chapter 4, *supra*.

(Chapter 21.—Modification of section 13, Code of Civil Procedure and section 41, Evidence Act. Chapter 22.—Recommendations)

21.2. It is obvious that in so far as there is, on any matter, a specific provision in the recommendation in regard to recognition of decrees of divorce, the position should be governed exclusively by the recommended provisions, and not by the provision in section 13 of the Civil Procedure Code, or section 41 of the Evidence Act, as the case may be. Hence the need for a consequential amendment. In the absence of a consequential amendment, there will be overlapping, and this might create confusion.

CHAPTER 22

RECOMMENDATIONS

Recommendations.

22.1. In the light of the discussion in the preceding Chapters, we recommend the enactment of a separate law on the lines indicated in the Bill annexed to this Report.[1] The Bill is, as is the usual practice of the Commission, a rough draft, intended to indicate in a concrete form our recommendations.

We may repeat what we have stated, namely, that suitable amendment excluding the application of section 13, Code of Civil Procedure, 1908, and section 41, Evidence Act, will also be required,[2] if our recommendations are accepted and the Bill introduced.

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[1] *See* Appendix.

[2] Chapter 20, *supra*.

The Recognition of Divorces and legal Separation Bill, 1976.

Short title, extent and commencement.

1. (1) This Act may be called the.....

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date the Central Government may, by notification in the official gazette, appoint in this behalf.

Definition.

2. In this Act—

Cf. section 8(3) English Act.

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

(b) "proceeding" includes any act which might be sufficient to effectuate a dissolution of marriage, however informal that act might be and whether or not any formality or legal process is required;

(c) institution, in relation to a proceeding constituted by an act otherwise than before an authority, means commencement of that act.

Recognition of foreign divorces and legal separations.

Cf. section 2, English Act.

3. Sections 4 to 6 shall have effect, subject to the provisions of section 7, as respects the recognition in India of the validity of foreign divorces and legal separations, that is to say, divorces and legal separations which—

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

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

Grounds of recognition.

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

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

(b) either spouse was a national of that country; or

(c) both spouses were domiciled in that country.

Cross-proceedings and separation converted into divorce.

(2) In relation to a country comprising territories in which different systems of law are in force in matters of divorce or legal separation, the provisions of sub-section (1) (except those relating to nationality) shall have effect as if each territory were a separate country.

Cf. section 4, English Act.

5. (1) Where there have been cross-proceedings, the validity of a foreign divorce or legal separation obtained either in the original proceedings or in the cross-proceedings shall be recognised if the requirements of clause (a) or (b) or (c) of sub-section (1) of section 4 are satisfied in relation to the date of the institution either of the original proceedings or of the cross-proceedings.

(2) Where a legal separation the validity of which is entitled to recognition by virtue of the provisions of section 4 or sub-section (1) of this section is converted, in the country in which it was obtained, into a divorce, the validity of the divorce shall be recognised whether or not it would itself be entitled to recognition by virtue of these provisions.

Cf. section 5, English Act.

6. (1) For the purpose of deciding whether a foreign divorce or legal separation is entitled to recognition by virtue of the provisions of sections 3 to 5, any finding of fact made (whether expressly or by implication) in the proceedings as a result of which the divorce or legal separation was obtained and on the basis of which jurisdiction was assumed in those proceedings shall—

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

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

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

Recognition of the ground of domicile.

7. (1) Divorces or legal separations obtained in a country other than the country of the spouses' domicile, and recognised as valid in the country of their domicile, shall be recognised in India.

(2) In any circumstances in which the validity of a divorce or legal separation obtained in a country outside India would be recognised by virtue of sub-section (1) if either

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

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

its validity shall also be recognised if sub-section (3) is satisfied in relation to it.

(3) This sub-section is satisfied in relation to a divorce or legal separation obtained in a country outside India if either—

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

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

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

(5) Sections 4 to 6 shall be without prejudice to the recognition of the validity of divorces and legal separations obtained outside India by virtue of sub-sections (1) to (3), or of any enactment other than this Act; but, subject to this section no divorce or legal separation so obtained shall be recognised as valid in India except as provided by these sections.

Re-marriage.

Cf. section 7, English Act as amended in 1973.

8. where the validity of a divorce obtained in any country is entitled to recognition by virtue of the provisions of sections 3 to 6 or by virtue of any rule or enactment preserved by sub-section (2) of section 7, neither spouse shall be precluded from re-marrying in India on the ground that the validity of the divorce would not be recognised in any other country.

No subsisting marriage.

Cf. section 8(1)(b), English Act.

Cf. Section 8(2), English Act as amended in 1973.

9. (1) The validity of a divorce or legal separation obtained outside India shall not be recognised in India if it was granted or obtained at a time, when according to the law of India (including its rules (of private international law and the provisions of this Act), there was no subsisting marriage between the parties.

(2) Subject to the provisions of sub-section (1), recognition by virtue of sections 3 to 6 or sub-section (2) of section 7 or of sub-section (5) of section 7 of the validity of a divorce or legal separation outside India shall be refused if, and only if,—

(a) it was obtained by one spouse—

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

Cf. section 8(2)(a), English Act.

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

(b) it was obtained by fraud; or

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

Cf. section 8(2)(b) English Act.

(3) Nothing in this Act shall be construed as requiring the recognition of—

(a) any findings of fault made in any proceeding for divorce or separation, or

Cf. section 8(3), English Act.

(b) any maintenance, custody or other ancillary order made in any such proceedings.

Cf. section 8(4), English Act.

10. The provisions of this Act relating to foreign divorces and legal separations apply to a divorce or legal separation obtained before the date of the commencement of this Act as well as to one obtained on or after that date, and, in the case of a divorce or legal separation obtained before that date—

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

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

Modification of application of certain provisions in relation to certain decrees.

11. In relation to the effect of decrees of divorce or legal separation to which this Act applies, the following provisions shall not apply as regards matters provided for by this Act, namely[1],—

(a) sections 41 and 44 of the Indian Evidence Act, 1872;

(b) section 13 of the Code of Civil Procedure, 1908.

Ancillary orders.

12. (1) Where the foreign divorce or legal separation is recognised by virtue of this Act, then, whether the foreign court has or has not passed ancillary orders, either party may apply to the competent court for passing ancillary orders.[2]

Explanation 1.—"Ancillary order", in relation to a proceeding for divorce or legal separation, includes an order—

(a) for the maintenance of either party to the proceeding, or

(b) for the custody, education or maintenance of the children of the family, or

(c) for the disposal of any property of either of the parties or their joint property.

Explanation 2.—"Competent Court", in relation to an application for an ancillary order, means the court which, under any law for the time being in force in India,—

(a) would be competent to try a proceeding for divorce or judicial separation, as the case may be, if, on the date of the application for ancillary order such a proceeding were to be instituted by the applicant, seeking divorce or judicial separation on a ground available under that law for divorce or judicial separation, as the case may be, and

(b) would have power to pass the ancillary order now applied for, on or after termination of the proceeding for divorce or judicial separation.

(2) On such application being made, the Court shall hear and dispose of the application according to Law.

Domicile and nationality of wife.

13. (1) For the purposes of this Act, and subject to the provisions of sub-section (2), the domicile of a married woman or at any time after the commencement of this Act shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile [3-4].

(2) Where, immediately before the commencement of this Act, a woman was married and then had her husband's domicile by dependence, she shall be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin), unless and until it is changed by acquisiton or revival of another domicile either on or after the commencement of this Act.

Alternative draft

(1) For the purposes of this Act, and subject to the provisions of sub-section (2), the domicile of a woman who is, or has at any time been married, shall be determined as if she had never been married.

(2) Where, immediately, before the commencement of this Act, a woman was married and then had her husband's domicile by dependence, she shall be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin), unless and until it is changed by acquisition or revival of another domicile either on or after the commencement of this Act.

Another alternative draft

(1) For the purposes of this Act, and subject to the provisions of sub-section (2), any rule of law whereby a woman on her marriage acquires her husband's domicile or nationality shall not be taken into account.

(2) Where, immediately, before the commencement of this Act, a woman was married and then had her husband's domicile by dependence, she shall be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin), unless and until it is changed by acquisition or revival of another domicile either on or after the commencement of this Act.

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[1]See Chapter 20 of the Report.

[2]See Chapter 19 of the Report Para. 19.14 and 19.27.

[3]See Chapter 15 of the Report.

[4]The last alternative draft is preferable.

APPENDIX 2

LETTER FROM THE MINISTER OF LAW, JUSTICE AND COMPANY AFFAIRS

D.O. No. F. 7(6)/75-IC

NEW DELHI/110 001 MARCH 13, 1975.

MY DEAR GAJENDRAGADKAR SAHEB,

I am sure the learned Members of your Commission have read with interest the judgment of Supreme Court in *Smt. Satya* v. *Teja Singh* (A.I.R. 1975 S. C. 105) refusing to recognise a decree of divorce obtained by Hindu husband against his Hindu wife from a Nevada court on the ground, *inter alia*, that it was obtained by fraud. The Court (Chandrachud J.) after noting that a divorce decree granted by a foreign court is recognised in another jurisdiction as a matter of comity, public policy and good morals but that comity does not require a country to give effect to the divorce laws of another which are repugnant to its own laws and public policy, observed at page 117:—

> "Unhappily, the marriage between the appellant and respondent has a limp. They will be treated as divorced in Nevada but their bond of matrimony will remain unsnapped in India, the country of their domicile.....
>
> "Out legislature ought to find a solution to such schizoid situations as the British Parliament has, to a large extent, done by passing the 'Recognition of Divorces and Legal Separations Act, 1971'. Perhaps, the International Hague Convention of 1970 which contains a comprehensive scheme for relieving the confusion caused by differing systems of conflict of laws may serve as a model. But any such law shall have to provide for non-recognition of foreign decrees procured by fraud bearing on jurisdictional facts as also for the non-recognition of decrees, the recognition of which would be contrary to our public policy."

May I, therefore, request you to get the matter examined by the Law Commission and favour us with a report.

With warm personal regards,

Yours sincerely,

Sd./- x x x

(H. R. GOKHALE).

DR. P. B. GAJENDRAGADKAR,
Chairman, Law Commission, New Delhi.

We would like to place on record our warm appreciation of the valuable assistance we have received from Shri Bakshi, Member-Secretary of the Commission in the preparation of this Report.

P. B. GAJENDRAGADKAR	*Chairman*
P. K. TRIPATHI	*Member*
S. S. DHAVAN	*Member*
S. P. SEN-VARMA	*Member*
B. C. MITRA	*Member*
P. M. BAKSHI	*Member-Secretary*

Dated New Delhi the April 5, 1976.

GIPN—S6—5 L.D. (N.D.)/76—7-12-76—2,000.