The Law Commission

Working Paper No. 77

Family Law

Financial Relief after Foreign Divorce

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

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It does not represent the final views of the Law Commission.

The Law Commission would be grateful for comments on this Working Paper before 31 March 1981.

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THE LAW COMMISSION 56-70-22

WORKING PAPER NO.77

FAMILY LAW

FINANCIAL RELIEF AFTER FOREIGN DIVORCE

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THE LAW COMMISSION

FAMILY LAW[1]

FINANCIAL RELIEF AFTER FOREIGN DIVORCE

PART I: INTRODUCTION

1. A man is legally liable to maintain his wife,[2] but in the absence of a court order he is under no obligation to maintain a former wife.[3] In most cases this gives rise to no practical problems, since the courts in this country have extensive powers on granting decrees of divorce (or nullity) or at any time thereafter to make financial provision and property adjustment orders.[4] Even if the marriage is dissolved or annulled abroad, it may well be that a maintenance order made by the foreign court would be enforceable here.[5] Nevertheless, there is a gap in the law where the marriage is terminated by foreign proceedings in

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1 Item XIX of the Second Programme.

2 Such an obligation exists at common law: see P.M. Bromley, Family Law, 5th ed., (1976) pp.496-9. In practice, however, statutory obligations are now more important: see Matrimonial Causes Act 1973, s.27 (as substituted by Domestic Proceedings and Magistrates' Courts Act 1978, s.63(1); Supplementary Benefits Act 1976, ss.17,18; Domestic Proceedings and Magistrates' Courts Act 1978, s.1(a).)

3 Throughout this paper we shall for convenience refer to a "wife" who will normally be the party requiring financial provision. In appropriate cases, however, the husband may be the party who is in that position and accordingly the reference to "wife" should be taken to include a "husband" in such a case.

4 Matrimonial Causes Act 1973, ss.23, 24.

5 See para. 21 below and the Appendix to this paper.

which no financial order is made, since our courts have no power to grant financial relief in such a case.

2. This gap can perhaps best be illustrated by a hypothetical, and to some extent exaggerated, case. Suppose an English woman marries a wealthy Ruritanian, and they establish the matrimonial home here in a house owned by the husband. In due course, the husband divorces her in Ruritania perhaps by pronouncing the word "talaq" three times (as is permitted by the law in many countries).[6] No financial order is made in Ruritania. If the Ruritanian divorce is recognised in this country as effective to terminate the parties' marriage (as may well be the case)[7] the wife will have no right to apply to the court here for financial provision: she will have ceased to be the husband's wife, so that he is no longer under a legal liability to maintain her.[8] She cannot invoke the powers of the divorce court to make financial provision or property adjustment orders because the court only has such power if it grants a decree,[9] and it cannot do this because

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6 See n.62, below.

7 Under s.3 of the Recognition of Divorces and Legal Separations Act 1971; see para. 7 below.

8 See e.g. Turczak v. Turczak [1970] P.198.

9 Matrimonial Causes Act 1973, ss.23(1), 24(1) ["On granting a decree ... or at any time thereafter ..."]; Moore v. Bull [1891] P.279.

there is no longer a marriage to dissolve.[10] She cannot enforce any foreign financial order, because no such order exists. Even the statutory right conferred by English law[11] on a married woman not to be evicted from the matrimonial home without leave of the court will have come to an end with the ending of the marriage.[12] Such a woman may thus face destitution, and her only source of financial support may be supplementary benefit; and if benefit is paid to her, the Supplementary Benefits Commission will have no legal right to recover the sums paid from the husband, since he will no longe be a "liable relative".[13] The fact that the husband lives

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10 See Torok v. Torok [1973] 1 W.L.R. 1066; Quazi v. Quazi [1979] 3 W.L.R. 833. It should also be noted that the wife would have no right to bring proceedings under s.37 of the Matrimonial Causes Act 1973, to avoid transactions by the husband intended to defeat her claim for financial relief or to frustrate or impede the enforcement of any order. To take advantage of this section there must be a subsisting claim for financial relief: see Joyce v. Joyce and O'Hare [1979] Fam. 93, 112. Hence the court would lack power to prevent a husband disposing of his share of jointly owned property (such as the matrimonial home); if he did sell his interest in the property so that a purchaser became entitled jointly with the wife the court, exercising its discretion under s.30 of the Law of Property Act 1925 might well, on the application of the purchaser, order a sale of the property with the result that the wife would be left with her share of the proceeds of sale, but no house, and no realistic possibility of providing herself with housing: Jackson v. Jackson [1971] 1 W.L.R. 1539; Re Bailey (A Bankrupt) [1977] 1 W.L.R. 278; cf. Williams (J.W.) v. Williams (M.A.) [1976] Ch. 278.

11 Matrimonial Homes Act 1967, s.1(1).

12 Ibid., s.2(2).

13 See Supplementary Benefits Act 1976, ss.17(1)(a), 18.

in this country and has substantial assets here makes no difference to the legal position. If he dies, the wife will have no entitlement to share in his intestacy;[14] she will not even have the right given to wives and former wives by the Inheritance (Provision for Family and Dependants) Act 1975[15] to apply to the court for reasonable financial provision to be made for her out of his estate because she has ceased to be a wife, and does not fall within that Act's definition[16] of "former wife" (which is limited to persons whose marriages have been dissolved or annulled by decree of an English court).

3. Two factors have exacerbated the problem: first, the greater readiness of English law to recognise the validity of foreign divorces[17] and, secondly, the greater geographical mobility which has led to a growth in the number of cases where one spouse has a sufficient connection with a foreign country to confer such jurisdiction (according to English law) as will enable him to bring divorce proceedings in that country.[18] In recent years there has been a steady stream of cases coming before the courts which has highlighted this gap in the law.[19] In most of the cases, the wife has

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14 Since she will no longer be a "surviving wife" for the purposes of the Administration of Estates Act 1925, s.46(1)(i).

15 Sects. 1, 2. Whether or not there has been a divorce the deceased must have been domiciled in England and Wales at the time of death for the court to have jurisdiction under this Act: ibid., s.1(1).

16 Sect.25(1).

17 See paras. 6-13, below.

18 Quazi v. Quazi [1979] 3 W.L.R. 833, 836 per Lord Diplock.

19 Turczak v. Turczak [1970] P.198; Torok v. Torok [1973] 1 W.L.R. 1066; Newmarch v. Newmarch [1978] Fam. 79; Joyce v. Joyce and O'Hare [1979] Fam. 93; Quazi v. Quazi [1979] 3 W.L.R. 833 (H.L.); Viswalingham v. Viswalingham (1979) 123 S.J. 604.

sought to deny the validity of the foreign divorce, so that the English court would be able to hear her petition for divorce, and make financial provision and property adjustment orders in her favour. In the most recent of these cases, Quazi v. Quazi, Ormrod L.J. in the Court of Appeal summed up the problem in these words:[20]

> "This litigation has been going on since December 1974, and has occupied no less than 14 working days in the court below and 7 days in this court. It has involved five experts in foreign law, three in Thai law, and two in Pakistani law, and a number of English lawyers. It has led to the expenditure, mostly out of the legal aid fund, of very large sums of money and to a disproportionate amount of intellectual effort to resolve one practical question: is there jurisdiction in the English court to dissolve this marriage, and make consequential orders relating to the ownership or occupation of the house in Wimbledon belonging to the husband in which the wife is, and has been, living with the son of the marriage, since June 1974, and for their financial support? These heavy and expensive labours have had to be undertaken because there is no statutory provision to enable the courts in this country to deal with ancillary relief after divorce unless a decree is granted in this country, notwithstanding that the persons concerned and the property are within the territorial jurisdiction. So it becomes necessary to investigate whether there is a subsisting marriage which the courts can dissolve and thereafter exercise the powers conferred by the Matrimonial Causes Act 1973. This involves long and complicated inquiries into the validity of overseas divorces and their recognition in this country. The costs of this case far exceed the value of the house in question and will fall on the British public. The position urgently requires the attention of Parliament with a view to giving power to the court to deal, much more simply, with such situations. We would draw attention to the judgment in Torok v. Torok [1973] 1 W.L.R. 1066 in the hope that something will now be done to avoid such situations in the future."

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20 [1979] 3 W.L.R. 402, 405.

In the House of Lords, Lord Scarman said:[21]

> "This complex, laborious, and expensive lawsuit has been almost totally financed from public funds. Legal aid alone has made it possible; and the costs borne by the public are out of all proportion to the modest prize at stake. While it is legitimate to take pride in our legal system which assures to the poor the same right of access to our courts for the resolution of their disputes as is enjoyed at their own expense by the wealthy (indeed, only the wealthy and the poor can find the finance for such a dispute as this) one must ask oneself whether there are not better and cheaper ways of doing justice. I agree with the Court of Appeal that the reform needed is one whereby a resident in the United Kingdom whose overseas divorce (or legal separation) is recognised by our law as valid, should be able, like one who has obtained a divorce or separation in this country, to claim a property adjustment or other financial order under the Matrimonial Causes Act 1973. In expressing the hope that the problem may be referred to the two Law Commissions, I would comment that such a reform should achieve not only a greater measure of justice for first-generation immigrant families but a considerable saving for the Legal Aid Fund. The incentive to challenge the foreign divorce would have gone: and the court could deal with the property and financial problems of the parties upon their merits."

4. Item XIX of our Second Programme of Law Reform constitutes a standing reference to us of Family Law matters, and accordingly no specific reference of this problem to us was required to enable us to undertake an examination of the present situation. We have no doubt that the law is at

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21 [1979] 3 W.L.R. 833, 850. Viscount Dilhorne also agreed that a United Kingdom resident whose divorce abroad is recognised here should not be debarred from obtaining financial relief in this country: ibid., at p.841.

present unsatisfactory; most people would, we think, agree that the wife in the hypothetical example that we have given earlier should have some legal redress in this country.[22] Nevertheless, there are some formidable problems[23] to be solved if the courts are to be given power to make orders in such cases.

5. Because it is the recognition of a foreign decree[24] (and the English court's consequent inability to grant a decree terminating a status which no longer exists) which is at the root of the problem, we put the matter in context by first setting out the present law in more detail under two heads:

(i) Under what circumstances will a foreign decree of divorce[25] be recognised in this country?

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22 There has been considerable academic support for change in the law: I.G.F. Karsten (1970) 33 M.L.R. 205, (1972) 35 M.L.R. 299 and (1980) 43 M.L.R. 202; J.A. Wade (1974) 23 I.C.L.Q. 461; D. Pearl [1974] C.L.J. 77; R.L. Waters (1978) 122 S.J. 326; J.G. Miller (1979) 123 S.J. 4, 26; M.L. Parry (1979) 9 Fam. Law 12; J.H.C. Morris, The Conflict of Laws (2nd ed., 1980) p.172; S.B. Dickson (1980) 43 M.L.R. 81; S.M. Nott (1980) 10 Fam. Law 13. The need for legislation was also suggested by Edward Lyons M.P. during the debate on the Bill leading to the Recognition of Divorces and Legal Separations Act 1971: see Hansard (H.C.) 5 May 1971, vol.816 col.1562.

23 These are discussed in paras. 22-27 below.

24 We are aware that in cases of extra-judicial divorce there is no "decree" but we use the word in this paper as a convenient way to denote the step which is effective to terminate the marriage according to the local law.

25 Unless otherwise indicated references in this Working Paper to "divorce" are intended to extend to nullity and judicial separation. We deal with the special questions relating to foreign nullity decrees at paras. 14-16 and 63 below and foreign legal separation decrees at para. 64 below.

(ii) If such a decree is recognised, what are the consequences in relation to property and financial matters? In this context we examine, first, the extent to which such a decree affects the rights of the parties to have recourse to the English courts; and, secondly, the extent to which any foreign order will be enforceable here.

We then turn to consider the difficulties which arise in the search for a solution to the problem we have discussed, and finally we set out our provisional proposals for reform.

PART II: THE PRESENT LAW

(1) Recognition of foreign divorce and nullity

6. Recognition of foreign[26] decrees of divorce and of legal separation is now governed by the Recognition of Divorces and Legal Separations Act 1971 (to which we shall refer as "the 1971 Act") while recognition of foreign decrees of nullity is still governed by the common law.

(a) The recognition of divorces and legal separations under the 1971 Act

7. This Act gave effect[27] to the Hague Convention on the Recognition of Divorces and Legal Separations of 1970.[28] The mischief which the Convention was designed to cure was that of the "limping marriage", that is "marriages that were recognised in some jurisdictions as having been validly dissolved, but in other jurisdictions as still subsisting."[29]

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26 Unless otherwise indicated, this expression refers to all courts outside England and Wales: courts in Scotland, Northern Ireland, the Isle of Man and the Channel Islands are for this purpose "foreign" courts. However there are specially favourable rules for recognition of British Isles decrees: see n.33 below.

27 See Quazi v. Quazi [1979] 3 W.L.R. 833, 836, 840 per Lord Diplock. The Act was based on recommendations of the Law Commission and the Scottish Law Commission: see the Report on The Hague Convention on Recognition of Divorces and Legal Separations (1970) Law Com. No. 34; Scot. Law Com. No. 16; Cmnd. 4542.

28 Cmnd. 6248. For a full analysis of the Act, see Cheshire and North, Private International Law, 10th ed., (1979) pp.371-389.

29 Quazi v. Quazi [1979] 3 W.L.R. 833, 836 per Lord Diplock.

In fact the English legislation, in its concern to put an end to the "scandal which arises when a man and woman are held to be man and wife in one country and strangers in another"[30] goes much further than was required under the Convention,[31] and lays down rules for recognition which are "simpler and more generous"[32] than the Convention required. The main principle of the Act is that an overseas[33] divorce or legal separation[34] is to be recognised in this country if, at the date of the institution of the proceedings in the country in which it was obtained - (a) either spouse was habitually resident[35] in that country; or (b) either spouse was a national of that country;[36] or (c) where the law of that country uses domicile as a ground of jurisdiction in divorce, either spouse was (in the foreign sense of the term) domiciled there.[37] There is also a requirement that the divorce must have been obtained by "judicial or other proceedings"[38] which

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30 Wilson v. Wilson (1872) L.R. 2 P. & D. 435, 442 per Lord Penzance.

31 For reasons set out in (1970) Law Com. No. 34, section V: see n.27, above.

32 I.G.F. Karsten (1972) 35 M.L.R. 299, 305.

33 All decrees granted under the law of any part of the British Isles (i.e. England and Wales, Scotland, Northern Ireland, the Channel Isles or the Isle of Man) on or after 1 January 1972 (1 January 1974 in the case of Northern Ireland) will be recognised throughout the United Kingdom: s.1, as amended by the Domicile and Matrimonial Proceedings Act 1973, s.15(2).

34 Defined by s.2 of the Act as "divorces and legal separations which:- (a) have been obtained by means of judicial or other proceedings in any country outside the British Isles; and (b) are effective under the law of that country". On the meaning of "judicial or other proceedings" see Quazi v. Quazi (above); para. 11, below.

35 Sect.3(1)(a).

36 Sect.3(1)(b).

37 Sect.3(2); see e.g. Messina v. Smith [1971] P.322.

38 Sect. 2; see n.34, above.

is of some importance in relation to the recognition of extra-judicial divorces (such as the Islamic talaq, or the Jewish gett); we return to the recognition of such divorces below.[39]

8. The Act expressly preserves[40] one common law recognition rule.[41] A divorce is entitled to recognition if it was obtained in the country of the spouses'[42] domicile,[43] or if it was obtained elsewhere but was recognised as valid in the country of the spouses' domicile.[44] In this case the Act does not impose any requirement that the divorce should have been obtained in "judicial or other proceedings". Consequently, the validity of certain informal extra-judicial divorces obtained in the country of the spouses' domicile (or obtained elsewhere but recognised there) will continue to be recognised here, since their validity would have been recognised at common law.[45] By contrast such informal extra-judicial divorces would not be recognised if obtained in a country with which the spouses' only connection was nationality or habitual residence because recognition of

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39 At para. 11.

40 Sect. 6 as substituted by the Domicile and Matrimonial Proceedings Act 1973, s.2(2).

41 Sect.6(5) of the Act (as substituted) preserves the statutory recognition of certain divorces granted outside the British Isles under e.g., the Indian Divorces (Validity) Act 1921, and the Colonial and Other Territories (Divorce Jurisdiction) Acts 1926 to 1950.

42 i.e. the domicile of each spouse (where the domiciles are different.) Sect.6 of the 1971 Act was amended by s.2(2) of the Domicile and Matrimonial Proceedings Act to take account of the possibility that spouses might thenceforth have different domiciles. The resultant rules are somewhat complex, but it remains the case that a divorce will not be entitled to recognition under the rule as preserved unless each spouse was domiciled in a country which would recognise the validity of such a divorce.

43 Le Mesurier v. Le Mesurier [1895] A.C. 517.

44 Armitage v. Att.-Gen. [1906] P.135.

45 Qureshi v. Qureshi [1972] Fam. 173; and see Quazi v. Quazi [1979] 3 W.L.R. 833, 852 per Lord Scarman.

their validity in this country would depend on the provision of the Act[46] which stipulates that the divorce should have been obtained "by means of judicial or other proceedings".

9. If the jurisdictional conditions set out above are satisfied the foreign divorce must be recognised[47] unless -

> "(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 reasonably have been given; or
>
> (b) its recognition would manifestly be contrary to public policy".[48]

If any of these grounds is made out the court has a discretion whether or not to refuse recognition to the foreign divorce.[49]

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46 Sect.2.

47 Unless, according to English law, including its rules of private international law, there was at the time of the foreign decree no marriage to be dissolved (for instance, because it had already been effectively dissolved elsewhere): s.8(1). In such a case recognition must be refused: ibid.

48 Sect.8(2).

49 Kendall v. Kendall [1977] Fam. 208; Newmarch v. Newmarch [1978] Fam. 79.

10. The "breadth and liberality"[50] of the jurisdictional rules contained in the Act, coupled with the traditional tendency of the English courts to confine within narrow limits the grounds on which it will refuse recognition to a foreign decree granted by a court with jurisdiction,[51] has greatly facilitated the recognition of foreign divorces. For example, in Torok v. Torok,[52] the parties were Hungarians who fled to England as refugees in 1956. They married in Scotland in 1957, became naturalised British subjects, and lived together, mainly in England, until 1967. In that year, the husband left the wife and their two children in England and went to live in Canada. In 1972, he petitioned for divorce in Hungary. It was held that any final decree made by the Hungarian court would have had to be recognised in this country,[53] notwithstanding the fact that the parties had been living outside Hungary since 1956, that they had married in England, that their only matrimonial home had been in this country and that their children had been brought up in England and been given English names.[54]

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50 Cheshire and North, Private International Law, 10th ed. (1979) p.376.

51 Because of the principles of comity: see especially Igra v. Igra [1951] P.404,412 per Pearce J.: "Different countries have different personal laws, different standards of justice and different practice. The interests of comity are not served if one country is too eager to criticise the standards of another country or too reluctant to recognise decrees that are valid by the law of the domicile".

52 [1973] 1 W.L.R. 1066.

53 Under Hungarian law (which in the circumstances the court was bound to apply: Recognition of Divorces and Legal Separations Act 1971, ss.5(1)(a), and (2)) the parties retained their Hungarian nationality which was a sufficient ground to justify the Hungarian court's assumption of jurisdiction: ibid., s.3(1)(b).

54 The spouses' future was "obviously here or in Canada or some other place, but certainly not in Hungary": [1973] 1 W.L.R. 1066, 1070 per Ormrod J.

Recognition of the Hungarian decree[55] would have prevented the English court from making ancillary financial and property orders. Furthermore, the Hungarian court would not normally make any financial provision order unless the wife were totally incapacitated from working; and even it it did make such an order there was no procedure for enforcing it against the husband abroad. In any event, the Hungarian court had no power to deal with the matrimonial home in England.

11. We have already said[56] that the Act requires[57] that in many cases recognition be given[58] to extra-judicial divorces.[59]

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55 In the event the adverse consequences of recognition were avoided, since the wife had filed a divorce petition in England before the Hungarian decree had become final. The court granted her an expedited decree absolute, and was thus able to assume jurisdiction in relation to financial and property matters: see para. 16 below.

56 See para. 7, above.

57 Either under ss.2 to 5 (which require "judicial or other" proceedings to have taken place) or on the common law grounds preserved by s.6 (which do not.)

58 For a full account of the law see P.M. North, The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland (1977), Chapter 11.

59 We have no precise information as to the number of extra-judicial divorces affecting people resident in this country; but some indication that the problem is of significance is to be found in marriage statistics since parties to a marriage have to divulge the details of their previous marital history. In 1971 it was estimated that about 150 remarriages in this country each year followed an extra-judicial divorce; about half of these followed a talaq: Hansard (H.C.) 5 May 1971, vol.816 col.1551 per Sir Geoffrey Howe, Solicitor-General. No figures more recent than 1971 are available but we understand from enquiries made with the Registrar-General's Office that the numbers are likely to be larger now than in 1971.

For example, under Islamic law,[60] a husband may divorce his wife by repeating the word "talaq" three times in the presence of witnesses,[61] and under the law of many countries with substantial Muslim populations such a divorce will be recognised as effective to dissolve the marriage.[62] Some countries, although in principle recognising the effectiveness of a talaq, impose additional formalities: for example, under the Pakistan Muslim Family Laws Ordinance 1961[63] notice of the talaq has to be given to a public authority, and the effect of the talaq is suspended for a period of 90 days to enable the authority to constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties. (There is however nothing to compel either spouse to take part in such conciliation proceedings).

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60 See generally A. Fyzee, Outlines of Muhammadan Law, 4th ed.(1975) Chap.IV.

61 Quazi v. Quazi [1979] 3 W.L.R. 833, 837, 846 per Lord Diplock and Lord Fraser of Tullybelton; see further North, op. cit., pp. 218-20 and the sources there referred to.

62 Thus affecting a potentially large number of U.K. residents and visitors. In 1978 the four countries (or groups of countries) with whom the largest number of immigrants to the U.K. were connected (the "country of last or next residence") were Bangladesh, India and Sri Lanka (together 10.2%); Pakistan (9.9%); Australia (9.7%) and the African countries of the Commonwealth (together 9.0%):(1980) Annual Abstract of Statistics (C.S.O.) Table 2.13).

63 Sects. 1 and 7.

In Quazi v. Quazi[64] it was held by the House of Lords that such a talaq was a divorce "obtained by means of judicial or other proceedings".[65] Since the husband was a Pakistani national[66] the talaq divorce had to be recognised in England, with the result that the English court had no jurisdiction to make a financial provision order against the husband (who was resident in this country) or to make a property adjustment order in respect of the house in Wimbledon bought by the husband in 1973, and in which the wife had lived since 1974.[67]

12. It is true that the Act, as we have seen, provides grounds upon which recognition of a foreign divorce may in certain "extraordinary circumstances"[68] be denied;[69] but there appears to be only one reported decision in which an English court has exercised its discretion to refuse to recognise a divorce decree granted by a court which had jurisdiction

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64 [1979] 3 W.L.R. 833.

65 Recognition of Divorces and Legal Separations Act 1971, s.2; see para. 8, above.

66 1971 Act, s.3(1)(b); see para. 7, above.

67 It may be that a "pure" talaq (and certain other types of extra-judicial divorce - see e.g. Viswalingham v. Viswalingham (1979) 123 S.J. 604) would be held not to have been obtained by "judicial or other proceedings" within the meaning of s.2 of the 1971 Act, and so not to be entitled to recognition under s.3. But if either party were domiciled in the foreign country where the divorce was obtained, its effectiveness might still be recognised by virtue of s.6: see Qureshi v. Qureshi [1972] Fam. 173; Quazi v. Quazi (above) at p.852. The law is complicated and in some respects uncertain: see North, op.cit., pp.233-238; Cheshire and North, Private International Law, 10th ed. (1979) pp.378-84; J.H.C. Morris, The Conflict of Laws, 2nd ed. (1980) pp.151-4.

68 Kendall v. Kendall [1977] Fam. 208, 214 per Hollings J. See n.70, below.

69 See para. 9, above; Cheshire and North, Private International Law, 10th ed. (1979) pp.384-9; North, op.cit. pp.186-90, and (in relation to extra-judicial divorce) pp.238-241.

(according to English rules) on the grounds primarily relevant to this Working Paper.[70] In Joyce v. Joyce and O'Hare,[71] the wife had in 1973 obtained magistrates' custody and maintenance orders in England on the grounds of the husband's adultery and cruelty. He paid nothing. In 1974 the husband went to live in Canada, and in 1975 started divorce proceedings there. The remaining facts are best summarised in the headnote:

> "The wife was anxious to contest the proceedings and consulted solicitors. They endeavoured by many inquiries to various bodies in Canada to obtain legal representation for the wife but the wife was not eligible for legal aid unless physically present in the Province of Quebec. The solicitors wrote to the registrar of the court stating that the wife wished to contest the husband's petition and that the maintenance orders made by the justices on the ground of the husband's desertion and adultery were in arrear. Rules of procedure in the court of Quebec prevented any letters written by the wife's solicitors from being placed before the court. In an undefended suit, the judge, without knowledge that the wife wished to be heard and that there had been earlier proceedings before the justices, granted the husband a decree nisi, awarded custody of the two children to the wife and ordered the husband to pay $70 a week for the children's maintenance. That order for maintenance could only be enforced by the wife if she was present in Canada. In September 1975, the wife petitioned for divorce and by his answer, the husband sought recognition of the Canadian decree which had been made absolute in October 1975."

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70 See also Kendall v. Kendall [1977] Fam. 208 where a wife "had been deceived by her husband's Bolivian lawyers into applying for a divorce which she did not want in a language which she did not understand": J.H.C. Morris, The Conflict of Laws 2nd ed., (1980) p.151. The court granted her application for a declaration that the Bolivian decree thus obtained was invalid; but it is not clear from the report whether her main motive in seeking such a declaration was to obtain financial relief against the husband.

71 [1979] Fam. 93.

Lane J. held that to recognise the Canadian decree would jar upon the conscience[72] and that she was entitled to refuse recognition on the grounds, first, that the petitioner had not been given a reasonably effective opportunity to take part in the Canadian proceedings;[73] and, secondly, that in any event it would be contrary to public policy in all the circumstances to recognise a decree which would effectively prevent the wife from enforcing her claim for any financial provision,[74] and would leave her and the children without any remedy with regard to their home. The result of the decision was thus to create a "limping marriage", valid in England but not in Canada or, probably, elsewhere.[75] Lane J. commented on the fact that the Recognition of Divorces and Legal Separations Act 1971 contains no reference to ancillary relief, and said "If the courts of this country were empowered to grant ancillary relief on recognition of a foreign decree, the position would be somewhat different".[76]

13. It is difficult to predict whether the decision in Joyce v. Joyce and O'Hare[77] will encourage parties to invite the courts to refuse recognition of foreign divorces not for lack of jurisdiction but because of considerations of public

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72 [1979] Fam. 93, 109, 114.

73 See Recognition of Divorces and Legal Separations Act 1971, s.8(a)(ii).

74 Ibid., s.8(b).

75 [1979] Fam. 93, 113.

76 Ibid., at p.110.

77 Ibid., at p.93.

policy. The courts have in the past been reluctant to refuse recognition on such grounds as can be seen from cases such as Hack v. Hack[78] and Newmarch v. Newmarch.[79] Furthermore, the speech of Lord Scarman in Quazi v. Quazi[80] suggests that he would not favour such a development:

> "The trial judge considered that the facts of the case did not justify him in refusing recognition. It was a matter for his discretion .... Even if I might have exercised the discretion differently it would be wrong to interfere; but, in truth, I think he was right".

We believe that a widespread refusal to recognise foreign decrees on the grounds of public policy would be unfortunate, and that the possibility of such a trend emerging adds weight to the case for conferring adequate powers on the court to ensure that recognition of a foreign decree does not necessarily affect the parties' financial position.[81]

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78 (1976) 6 Fam. Law 177.

79 [1978] Fam. 79, 97 where Rees J. said "If I had been so satisfied [i.e. that recognition would manifestly be contrary to public policy] I would nevertheless in the exercise of my discretion have upheld the decree". See also Quazi v. Quazi [1979] 3 W.L.R. 402, 418 per Ormrod L.J. It should be noted however that in Newmarch recognition of the foreign decree did not prevent the court from being able to order financial relief for the wife, while in Joyce such recognition would have had, and in Quazi it did have, this effect.

80 [1979] 3 W.L.R. 833, 856.

81 See I.G.F. Karsten (1980) 43 M.L.R. 202, 208-9: "The real reason why the English courts have recently been making such heavy weather of the recognition of non-judicial divorces is that the question of recognition has tended to arise in the context of a claim by a wife to financial relief .... The loss of the power to award financial relief to a spouse can be an exceedingly heavy price to pay for the avoidance of a limping marriage .... Once this much-needed reform materialises, our courts will be able to banish their present scruples about recognising foreign divorces".

(b) Recognition of foreign nullity decrees

14. As has already been pointed out, recognition of foreign nullity decrees is not governed by statute. In some respects the law is uncertain,[82] but it would seem that in principle a foreign decree of nullity will be recognised in the following cases:

(a) where the decree is granted by the courts of the parties' common domicile[83] and, probably, also where it is granted by the courts of only one party's domicile;[84]

(b) where the decree, although not obtained in the country of the parties' common domicile, would be recognised as valid by the courts of their common domicile;[85]

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82 See Dicey and Morris, The Conflict of Laws, 9th ed. (1973) pp.364-372; P.M. North, The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland, (1977) Chap. 12; Cheshire and North, Private International Law, 10th ed. (1979) pp.406-416; J.H.C. Morris, The Conflict of Laws, 2nd ed. (1980) pp.158-162. The Law Commission and Scottish Law Commission expect soon to publish a joint Working Paper on the question of recognition of foreign nullity decrees.

83 Von Lorang v. Administrator of Austrian Property [1927] A.C. 641. (This case is often cited as Salvesen v. Administrator of Austrian Property but this seems to be incorrect: see J.H.C. Morris, op.cit., p.158 n.90)

84 Lepre v. Lepre [1965] P.52.

85 Abate v. Abate [1961] P.29.

(c) possibly, where the decree is granted by the courts of the parties' common residence;[86]

(d) where the decree is granted by the courts of the country with which either party has "a real and substantial connection";[87]

(e) probably, where the decree is granted in circumstances in which, mutatis mutandis, the English court would have jurisdiction to grant a decree;[88]

(f) possibly, in the case of a void marriage, where the decree is pronounced by the courts of the country where the marriage was celebrated,[89] although recognition on this basis now seems less likely than was once the case.[90]

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86 Merker v. Merker [1963] P.283, 297.

87 Law v. Gustin [1976] Fam. 155; Perrini v. Perrini [1979] Fam. 84.

88 i.e. where either party is domiciled in England and Wales when the proceedings are begun, or has been habitually resident here for a year before the start of the proceedings: Domicile and Matrimonial Proceedings Act 1973, s.5(2) and (3). See Corbett v. Corbett [1957] 1 W.L.R. 486; Merker v. Merker [1963] P.283.

89 Corbett v. Corbett [1957] 1 W.L.R. 486; Merker v. Merker [1963] P.283.

90 The basis of recognition in such cases seems to have been reciprocity. As a result of the Domicile and Matrimonial Proceedings Act 1973 the English courts can no longer assume jurisdiction to annul a void marriage merely because it has been celebrated here; it therefore seems doubtful whether they will feel obliged to recognise foreign decrees where jurisdiction had been assumed on that basis.

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

(a) the decree was obtained by fraud;[91]

(b) it offends against rules of natural justice;[92]

(c) it offends against English ideas of "substantial justice".[93]

The grounds on which the English courts may refuse to recognise a foreign nullity decree are thus similar to those relating to non-recognition of divorces.[94] However it has been said[95] that the courts have shown a greater willingness to allow decrees of nullity to be attacked on grounds other than jurisdictional grounds. In particular, the courts have seemed perhaps surprisingly ready to withhold recognition where it is alleged that recognition would be contrary to natural or substantial justice.[96]

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91 Von Lorang v. Administrator of Austrian Property [1927] A.C. 641.

92 Mitford v. Mitford [1923] P.130, 141-2; Merker v. Merker [1963] P.283, 296, 299.

93 Gray v. Formosa [1963] P.259.

94 As to which see para. 9, above.

95 J.H.C. Morris, The Conflict of Laws, 2nd ed. (1980) p.161.

96 Ibid., and see P.M. North, The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland (1977) pp.261-4; Cheshire and North, Private International Law, 10th ed. (1979) pp.412-5.

(2) Effects of a valid foreign decree

16. If a foreign decree of divorce or nullity[97] is recognised in this country the parties are no longer husband and wife, and accordingly no longer enjoy any rights which depend on that status.[98] Furthermore, the English courts have no jurisdiction to entertain subsequent divorce or (probably)[99] nullity proceedings, with the result that they have no power to exercise the extensive powers to make financial provision and property adjustment orders in favour of either party.[100] The effect of a foreign decree on a

97 As to the effects of a foreign separation order see para. 64, below.

98 See para. 2, above.

99 If the marriage were void, it is possible that the English court would still have jurisdiction to grant a decree of nullity, notwithstanding the existence of a prior foreign decree entitled to be recognised here. In such a case the foreign decree would not have altered the status of the parties: both before and after the decree they were unmarried, and it might be urged that recognition of the foreign decree should not prevent the English court from itself pronouncing on that fact. Indeed in two cases an English court has itself granted a decree in similar circumstances: see Galene v. Galene [1939] P.237; De Massa v. De Massa (1931) [1939] 2 All E.R. 150n. However in neither of these cases does the effect of recognition of the foreign decree on the English court's jurisdiction seem to have been fully considered; and it has been suggested that the divorce analogy would be appropriate in relation to the effect of the foreign decree on proceedings in England for ancillary relief, since "the marriage has already been declared null and void": see P.M. North, The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland (1977) p.268. The question in essence seems to be whether the English court would regard the foreign decree as creating an estoppel per rem judicatam against further litigation. There would be formidable problems if it did not do so - for example, what would the position be if the English court heard the petition, but then (contrary to the foreign decree which is entitled to recognition) held, on the facts, that the marriage was valid?

100 See para. 2, above.

wife's rights may thus, as we have illustrated above,[101] be very serious. Nevertheless, a former husband or wife is not necessarily deprived of all effective financial remedies in this country, and we now summarise the procedures by which he or she may, notwithstanding the foreign decree, obtain some measure of relief.

(a) Claim to ownership of property

17. Either spouse can continue to assert a claim to the beneficial ownership of property at law or in equity.[102] He or she may, for example, be able to establish a proprietary interest under an implied, resulting or constructive trust, the existence of which the court may be able to infer from his or her contributions to the acquisition or improvement of the matrimonial home.[103] However, the outcome of such a claim is often difficult to predict;[104] and even if the applicant does successfully assert an interest the court lacks

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101 Ibid.

102 The special summary procedure under s.17 of the Married Women's Property Act 1882 (which is available in the county court as well as in the High Court) will remain available for three years after the divorce or annulment (assuming that for this purpose the courts treat a foreign dissolution or annulment as if it had occurred in this country): Matrimonial Proceedings and Property Act 1970, s.39. It appears that, in some circumstances at least, the court will have jurisdiction under the 1882 Act in respect of property (including land) situate abroad: Razelos v. Razelos (No. 2) [1970] 1 W.L.R. 392.

103 See P.M. Bromley, Family Law, 5th ed. (1976) pp.461-475. In the case where one spouse has contributed to the improvement of the property, a claim may also be made under the Matrimonial Proceedings and Property Act 1970, s.37.

104 "To determine property rights strictly so called between spouses is a notoriously hazardous and difficult operation" Fielding v. Fielding [1977] 1 W.L.R. 1146, 1148 per Ormrod L.J.

the wide and flexible powers of transfer and adjustment which it possesses under the divorce jurisdiction.[105] Those powers are exercised so far as possible to preserve a secure home for both parties whilst also preserving their financial interest in the property.[106] This aim is almost impossible to achieve if the court is obliged merely to give effect to the parties' proprietary interests.

(b) Maintenance proceedings started before foreign decree effective

18. If either party has during the subsistence of the marriage obtained a financial order from an English court on the ground of the failure of the other to provide reasonable maintenance[107] the order survives an English decree and it has been held that it also survives a foreign divorce,[108] and can subsequently be varied by the court. It should,

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105 See Williams (J.W.) v. Williams (M.A.) [1976] Ch. 278.

106 See S.M. Cretney, Principles of Family Law, 3rd ed. (1979) pp.320-325.

107 By virtue of the Matrimonial Causes Act 1973, s.27, or the Domestic Proceedings and Magistrates' Courts Act 1978, s.1. (The relevant provisions of this latter Act have not yet been brought into force, but we anticipate that they may be implemented during the period of consultation on this Working Paper.)

108 Wood v. Wood [1957] P.254; Newmarch v. Newmarch [1978] Fam. 79, where the court upheld the validity of an Australian divorce decree in the exercise of its discretion under s.8(2) of the Recognition of Divorces and Legal Separations Act 1971 (para. 9, above) notwithstanding the fact that the wife established that she was not given such an opportunity to take part in the Australian proceedings as she should reasonably have been given: see per Rees J. at p.97; cf. Joyce v. Joyce and O'Hare [1979] Fam. 93 (para. 12, above) where recognition of a Canadian divorce decree was refused.

however, be noted that it is essential that the English proceedings be started[109] before the foreign decree becomes

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109 On one view, it is necessary that an order should have been obtained: see Turczak v. Turczak [1970] P.198 where a wife's application for periodical payments under s.22(1) of the Matrimonial Causes Act 1965 on the ground of her husband's wilful neglect to maintain was made after a Polish dissolution order, but before that order became final and absolute. Lloyd-Jones J. seems to have accepted that he could not make any order since there was no subsisting marriage between the parties at the time when the application came before the court to be heard: see at p.206. This decision (which is cogently criticised by I.G.F. Karsten in (1970) 33 M.L.R. 205) was apparently not cited in Newmarch v. Newmarch, where it was held that there was jurisdiction to make an order on the ground of wilful neglect provided that proceedings had been started before the foreign divorce became effective: see per Rees J. at pp.102-103. It is possible to reconcile the two decisions on the basis that in Turczak the court relied on the statutory provision (Matrimonial Causes Act 1965, s.22(1)(b)) that it should not entertain an application "unless it would have had jurisdiction to entertain proceedings for judicial separation" which (so it was said) it could not do if the parties had ceased to be husband and wife. That restriction was removed by s.6(1) of the Domicile and Matrimonial Proceedings Act 1973, and was thus not applicable in Newmarch. This suggested reconciliation of the two decisions has, however, been criticised by M.L. Parry in (1979) 9 Fam. Law 12 on the ground that proceedings for wilful neglect are based on the common law duty to maintain, which comes to an end with the marriage; thus, in his view, if the marriage were no longer in existence at the time of the hearing the court should not have entertained the application. Whatever the merits in this controversy Mr. Parry's argument in support of a continued application of Turczak's case would probably not survive the substitution by s.63(1) of the Domestic Proceedings and Magistrates Courts Act 1978 of failure "to provide reasonable maintenance" for "wilful neglect", since the new formulation is entirely statutory and is not intended merely to provide a procedure for enforcement of the common law duty: see our Report on Matrimonial Proceedings in Magistrates' Courts (1976) Law Com. No. 77 paras. 9.1-9.24.

effective, and that in any event the courts' powers to make orders on the ground of failure to provide reasonable maintenance are restricted, and in particular do not extend to the making of property adjustment orders.

(c) English divorce or nullity proceedings started before foreign decree effective

19. If either party files a petition for divorce or nullity in this country before the foreign decree becomes effective, the court has jurisdiction to grant a decree, and to exercise its powers to make financial provision and property adjustment orders. The courts may make orders before the English decree is made absolute,[110] but such orders do not take effect unless the decree has been made absolute.[111] In a proper case, therefore, the court will expedite the making of the decree absolute, to ensure that it is made whilst the marriage still subsists according to English law.[112] At this stage, it should be noted that the court has power, where litigation in respect of the marriage is continuing in another jurisdiction, to stay any English proceedings.[113] It is provided, however, that the court should not order a stay unless it appears that the balance of fairness, including convenience as between the parties to the marriage, is such that it is appropriate for the proceedings in the other jurisdiction to be disposed of first;[114] and in Mytton v. Mytton[115] the court refused a stay on the basis that the question of ancillary relief for the wife, who was living

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110 See Matrimonial Causes Act 1973, ss.23(1) and 24(1).

111 Ibid., ss.23(5), 24(3).

112 As was done in Torok v. Torok [1973] 1 W.L.R. 1066.

113 Domicile and Matrimonial Proceedings Act 1973, Sched. 1, para.9.

114 Ibid.

115 (1977) 7 Fam. Law 244.

in property in England bought by the husband, was crucial.[116]

(d) Provision for children

20. The termination of the marriage will not prevent the English court from entertaining applications by a child's mother or father for child maintenance under the provisions of the Guardianship of Minors Acts 1971 and 1973,[117] but the child must (probably) be a United Kingdom citizen or be present or ordinarily resident in this country[118] and the respondent has to be served with proceedings or submit to the jurisdiction.[119] Furthermore, if a child is made a ward of court the court may order either parent to make periodical payments towards the maintenance and education of the child.[120] However these powers are narrower than the powers exercisable in divorce

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116 Where the foreign proceedings are in a "related" jurisdiction, i.e. within the U.K., Channel Islands or Isle of Man, the court must, subject to certain conditions, stay the English proceedings: Domicile and Matrimonial Proceedings Act 1973, Sched. 1, para. 8.

117 Guardianship of Minors Act 1971, ss.9(2) and 10(1)(b) as substituted by the Domestic Proceedings and Magistrates' Courts Act 1978, ss.36(1) and 41(3) respectively.

118 See Harben v. Harben [1957] 1 W.L.R. 261; In re P. (G.E.) An Infant [1965] Ch. 568.

119 See Re Dulles' Settlement (No. 1) [1951] Ch. 265.

120 Family Law Reform Act 1969, s.6. The rules of jurisdiction are the same as those for guardianship cases in the High Court: see above.

proceedings,[121] both in respect of the types of order that can be made,[122] and of the range of persons who can be ordered to make payments.[123]

(e) Enforcement of a foreign order

21. If a foreign maintenance order has been obtained it may in some circumstances be enforced in this country. There is, indeed, an increasing move towards international enforcement of maintenance orders under the Maintenance Orders (Reciprocal Enforcement) Act 1972 which now

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121 Once divorce proceedings have been started the court may make financial orders in respect of children of the family even if the suit is dismissed: see s.23(2) of the Matrimonial Causes Act 1973; P(L.E.) v. P(J.M.) [1971] P.318 (husband sought declaration that foreign decree valid, and in alternative petitioned for divorce; declaration granted before divorce petition called on. Held: court nevertheless had jurisdiction to make maintenance orders in respect of children); Hack v. Hack (1976) 6 Fam. Law 177.

122 There is no power to make property adjustment orders: cf. s.24(1) of the Matrimonial Causes Act 1973.

123 In divorce proceedings orders can be made against either party to a marriage in respect of any child of the family: ibid. This expression includes any child (other than one who has been boarded-out by an authority) who has been "treated by" either party to the marriage "as a child of their family": Matrimonial Causes Act 1973, s.52(1). Under the guardianship and wardship legislation an order can only be made against the child's mother or father.

applies to divorced spouses.[124] However the provisions for reciprocal enforcement, which we set out separately in the Appendix to this paper, suffer from several drawbacks in this context. First, they do not apply to every foreign country.[125] Secondly, orders relating to property are not within the purview of the reciprocal enforcement provisions. Thirdly, there can be no question of enforcement unless an order has been obtained;[126] not only may this be impracticable for financial[127] or other reasons but the maintenance provisions in the foreign country may be less wide or flexible than those in England. Finally, the case for relying on reciprocal enforcement assumes that the spouse should apply for an order in the country where the divorce was obtained: but that country, as we shall see below,[128] may be a less appropriate forum as regards the parties or their marriage than is this country.[129]

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124 Maintenance Orders (Reciprocal Enforcement) Act 1972 s.28A, added by the Domestic Proceedings and Magistrates' Courts Act 1978, s.58.

125 See Appendix.

126 It may be possible to transmit a claim under Part II of the Maintenance Orders (Reciprocal Enforcement) Act 1972: see para. 7 of the Appendix.

127 Many such cases involve distant countries to which travel may be difficult or expensive, such as Canada (Joyce v. Joyce and O'Hare [1979] Fam. 93) or Australia (Newmarch v. Newmarch [1978] Fam. 79). Moreover, English legal aid is not available for foreign proceedings. The "shuttlecock" procedure may, however, avoid the necessity to travel to the other country: see para. 2 of the Appendix.

128 At para. 27.

129 See e.g. Torok v. Torok [1973] 1 W.L.R. 1066.

PART III: THE PROBLEMS OF REFORM

(1) Introduction

22. We do not think that the limited and partial remedies outlined above are adequate to fill the gap which exists in the law; in particular, for the reasons we have given above we do not think that the problem can be left to be solved by reciprocal enforcement of foreign maintenance orders.[130] It is thus our view that in some circumstances the court in England should have power to make a financial order in favour of a former spouse whose marriage has been terminated by a foreign decree. However, we have found considerable difficulty in defining in precisely what circumstances such a power should be exercisable. In our view, the advantage of giving a remedy needs to be very carefully balanced not only against the risks of "forum-shopping" (that is, the risk that litigants with little or no real connection with this country would start proceedings here solely because they would be likely to find it financially advantageous to do so) but also against the related risk that to confer such a power on the courts could, in the absence of any clear guidance on what law should apply to the incidents of a particular marriage, pose problems which it would be difficult, if not impossible, for them to resolve.

23. At the start of this paper,[131] we illustrated the gap which exists in the law by reference to the hardship which could be caused to an English woman whose marriage to a wealthy Ruritanian was validly dissolved by a talaq pronounced by him in Ruritania. We pointed out that the wife would be effectively without redress in this country,

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130 Cf. the view of Dimitry Tolstoy, Q.C. (1972) 35 M.L.R. 679, 680.

131 Para. 2, above.

even though the matrimonial home was here, and indeed though the husband continued to reside here. The same example can, however, be adapted to illustrate some of the formidable problems which in our view have to be faced in formulating proposals for reform.

24. First of all, on the facts as given in the example, the wife made no claim for financial relief in Ruritania, possibly because there was no power to make any such order in Ruritanian law. But suppose that the wife could have claimed financial provision in Ruritania. Should she be allowed to claim financial relief in England instead? Should she be able to do so merely because she finds it more convenient, or tactically more advantageous or - perhaps most importantly - because she thinks she may get a larger award in this country than in Ruritania? Problems could arise even if the wife were able to make a claim for financial relief and in fact did so - but either failed to obtain any order, or obtained an order which she thought to be inadequate.[132] Should she be able to apply to the English court? If so, what principle should the English court apply in deciding whether or not to make an order in her favour? The root of the difficult and intractable problems thus raised is that different countries have different policies about the scope and purpose of the law governing financial provision. In English law the court is directed to have regard to all the circumstances of the case and so to exercise its powers as to place the parties, "so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other".[133] English law may

132 The wife might have deliberately refrained from making any claim in that country because she knew she would obtain only very limited provision.

133 Matrimonial Causes Act 1973, s.25(1).

seem to adopt the principle that the parties should be placed in the position which would have resulted if the marriage had continued, but other countries in contrast have adopted different policies - for example, that the law should aim only to restore the parties to the position in which they would have been had the marriage never taken place at all. In this latter view the function of financial provision for a wife is seen to be no more than rehabilitative;[134] such a law would thus seek to provide only short term relief designed to enable the wife to adjust to the changed circumstances. If the English court were given a general power to make financial orders notwithstanding the existence of a valid foreign divorce, it might thus be faced with an application by a former wife whose financial claim had been properly dealt with according to the law of the country where the divorce was granted (perhaps also the country of her domicile, nationality or residence) on the basis that financial provision was to be merely rehabilitative.

25. Problems might also arise because of different policies about the extent to which entitlement to financial relief should be affected by the applicant's conduct. In this country, the court is, in determining applications for financial relief, directed to "have regard to" the parties' conduct;[135] but in practice an applicant's misconduct is only allowed to affect the outcome of the case if it was of "such a gross kind that it would be offensive to a sense of justice that it should not be taken into account."[136] In other countries conduct may

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134 This view appears to have influenced the law now in force in Australia (see H.A. Finlay, Family Law in Australia, 2nd ed. (1979) p.222 ff.) and West Germany (see Müller-Freinfels (1979) 28 I.C.L.Q. 184, 196-202).

135 Matrimonial Causes Act 1973, s.25(1).

136 Jones v. Jones [1976] Fam. 8, 15 per Orr L.J. See also Armstrong v. Armstrong (1974) 118 S.J. 579, Court of Appeal transcript No.137, cited in Kokosinski v. Kokosinski [1980] 1 W.L.R. 55,65.

be of far greater importance - indeed the court may have no power to award financial relief to a "guilty" party, for example a wife who has been found to have committed adultery. What should be the attitude of the English court if faced with an application by a wife whose conduct either was treated as material by a foreign court granting the divorce, or would have been so treated had she applied there for financial relief?[137]

26. Finally, what would be the position if the foreign court had more restricted powers - limited, perhaps, to periodical payments, and not extending to capital provision - than those possessed by the English court? What should the English court do if a wife had obtained an order for periodical payments in the foreign proceedings but now sought an order relating to capital assets owned by the husband in England; or if the foreign court had made no order for periodical payments because it would have been unrealistic to do so, and no order in relation to the matrimonial home because it had no power to do so?

27. These questions all pose the same fundamental difficulty of deciding which of two or more legal systems with which the parties' marriage is in some way connected should apply to the financial and other consequences of termination. In a world of pure legal analysis, it would no doubt be possible to identify a single system of law with which the marriage was more closely connected than

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137 Under the Recognition of Divorces and Legal Separations Act 1971 there is no requirement that findings of fault made either in divorce proceedings themselves or in ancillary proceedings are to be recognised: s.8(3). It would be necessary to decide whether, and if so how, this rule should be changed; the rule was expressly stated in similar terms in Article 1 of the Hague Convention (as to which see para. 7, above). And would it be open to the wife to raise in the English proceedings issues which she might have raised in the foreign divorce proceedings but which she failed to raise?

any other: that system could then be regarded as the "proper law" of the marriage. As such it would govern the marriage and its consequences. We do not however think that this aim can in practice be achieved. At a time when people can travel easily from one country to another marriages are increasingly connected with several different systems of law (for example, with the law of the parties' nationality,[138] or the law of their place of residence, the law of the place where the marriage was celebrated, or even with the law of their religion).[139] In our view, it is unrealistic to suppose that a process of juristic analysis will identify any single "right" system of law to which all questions relevant to a particular marriage should be referred to the exclusion of all other systems. However, even if we believed that such a search might have worthwhile results we are quite sure that the present law, insofar as it is based on the principle that the court of the country granting the divorce is alone competent to deal with all questions of financial provision between the spouses, provides a wholly inadequate solution to the problem.[140] As we have seen,[141] a divorce which will have to be recognised in this country may well have been granted under a legal system with which the parties' real connection is tenuous in the extreme.[142]

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138 The parties may, of course, have different nationalities; and one or both may have dual nationality.

139 Particularly if the law of their nationality or residence applies different personal laws to members of different religions as is the case in Pakistan (Muslim Family Laws Ordinance 1961, s.1(2)) and a number of other countries, including several formerly subject to British rule.

140 Cf. Dimitry Tolstoy, Q.C. (1972) 35 M.L.R. 679.

141 At para. 10, above.

142 See, e.g. Torok v. Torok [1973] 1 W.L.R. 1066.

(2) Should there be a bar in cases where the foreign court has, or could have, made an order?

28. The difficulties in the way of reform of the law are thus formidable. They are most acute in cases in which the wife could have applied for financial relief in the country where the divorce was granted, but either failed to do so or did so but obtained an order which she regards as inadequate; correspondingly the difficulties are least acute in cases where the law of the country where the divorce was granted contained no provision for financial relief in favour of a wife. We think there is little doubt that a wife who is thus unable to obtain any financial relief should, provided that she can establish a sufficient link between the marriage and this country, be eligible to apply for a financial order here; but we have had to consider carefully whether the power we propose for the English court to hear applications for financial relief notwithstanding the existence of a prior foreign decree of divorce should be exercisable only in such cases and not in cases where the foreign court had made, or could have made, a financial order.

29. We are, however, in no doubt that such a rigid restriction would be inappropriate. Our primary reason is that, as we have seen, the country in which the divorce was granted may well not be one with which the marriage had much real connection; but there are also subsidiary arguments which seem to us to support the view that a restriction of this kind would be undesirable. First, injustice could occur if the foreign divorce court, having dealt with part of a wife's claim for financial relief, could not or would not make any order in relation to capital assets in England, and the English court were precluded from making any order because of the foreign court's order. Secondly, such a restriction could lead to difficulties in deciding whether under the relevant foreign legal system a wife did or did

not have a right to apply for financial relief. The English court would in each case have to examine the foreign law to determine the remedies available in the foreign country: and it would also be necessary to decide what rights under the foreign law would operate to bring the restriction into play - would a right to apply for payment of deferred dowry, for example,[143] suffice? Thirdly, the decided cases[144] show that it may be difficult for a wife to assert a claim in a foreign court (because of distance of travel for instance) even if she has the legal right to do so; if the fact that she had the legal right to apply in the divorce proceedings were a bar on applications for financial relief here, the court would be faced with the invidious question whether to exercise its discretion to refuse recognition of the divorce notwithstanding that it had been granted by a court of competent jurisdiction [145] in the eyes of English law. In such a case, if the only substantial assets were in England, the wife might not even find it worthwhile applying for a foreign order: yet it might be said that the foreign court could have made some order. Finally, a bar of the type envisaged would inevitably lead, to a greater extent than at present, to unedifying competitions to start divorce proceedings here in time to enable the English court to grant a decree (and thus ancillary relief) before the marriage had been finally terminated abroad.[146]

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143 As in Shahnaz v. Rizwan [1965] 1 Q.B. 390; Qureshi v. Qureshi [1972] Fam. 173.

144 Newmarch v. Newmarch [1978] Fam. 79; Joyce v. Joyce and O'Hare [1979] Fam. 93.

145 See para. 9, above.

146 Cf. Torok v. Torok [1973] 1 W.L.R. 1066; see paras. 10 and 16, above.

30. We therefore consider that it would be inappropriate to establish a rigid bar on the court hearing applications merely because a foreign court had made, or could have made, a financial order. We think it better to seek some other way of minimising the difficulties with which the courts might be faced if they were to have a general and unrestricted power to make financial orders notwithstanding the existence of a foreign decree.

(3) Rules of jurisdiction

31. The traditional way of ensuring that only those persons whose case has a sufficient connection with this country are entitled to invoke its legal process is by means of jurisdictional rules. What is a sufficient connection for this purpose depends on the nature of the issue: thus, the English courts have jurisdiction to hear cases relating to the custody and upbringing of a child if the child is physically present (for however transient a purpose) in this country;[147] at the other extreme, if questions of status (such as legitimacy) are involved the court may not be able to assume jurisdiction unless it can be shown that the person concerned is domiciled here.[148] In the present context, therefore, the task is to formulate jurisdictional rules strict enough to prevent persons, whose marriage is insufficiently connected with this country to make it appropriate for the English court to adjudicate on financial matters, from invoking the court's powers; but not so strict as to exclude meritorious cases. We therefore turn to consider what the jurisdictional rules[149] should be in

147 Johnstone v. Beattie (1843) 10 Cl. & F.42; Re D. (An Infant) [1943] Ch. 305.

148 See, e.g., Matrimonial Causes Act 1973, s.45(1).

149 The rules with which we are here concerned determine whether the courts in England and Wales should be entitled to hear the application; the question of which courts (High Court, county court etc.) should exercise jurisdiction is dealt with below: see paras. 53-54.

a case where a person seeks financial relief in England notwithstanding the existence of a foreign decree; we then consider whether the jurisdictional rules which we propose would by themselves be sufficient to ensure that the marriage in question is sufficiently connected with this country to minimise the problems we have outlined below.

(a) Analogy with jurisdiction in divorce

32. There is, we think, a strong argument for basing the jurisdictional rules governing applications in this country for financial relief after a foreign decree on the principles which govern jurisdiction in divorce, nullity and judicial separation. After all, if those rules are satisfied the applicant could have brought divorce or other proceedings in this country in the first place; had the applicant done so, the court would have had jurisdiction to grant the financial relief sought.

33. English courts have jurisdiction[150] to entertain proceedings for divorce, judicial separation or nullity[151]

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150 Domicile and Matrimonial Proceedings Act 1973, s.5(2) and (3).

151 In the case of nullity petitions there is an additional basis of jurisdiction, unlikely to be of practical significance in the present context, viz. the court has jurisdiction if either party died before the start of the proceedings and either (i) was at death domiciled in England and Wales, or (ii) had been habitually resident in England and Wales throughout the period of one year ending with the date of death.

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."[152]

It will be noted that the relevant question is whether the conditions were satisfied on the date when the petition[153] was presented.[154] If those jurisdictional criteria were to be adapted to applications for financial orders by an applicant who had been divorced abroad it would also have to be decided whether it should suffice if the jurisdictional criteria were satisfied (a) at the time the foreign divorce became effective,[155] or the (later) time when the application to the English court for financial relief was started.

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152 Sect.5(5) of the Act provides for cases where a cross-petition or a supplemental petition is filed after the initial basis of jurisdiction has been destroyed by a change of domicile or residence.

153 The jurisdiction of the court to entertain cross-proceedings and supplemental petitions is preserved notwithstanding any subsequent change in the parties' domicile or residence: see the previous footnote.

154 It should be noted that applications for financial relief must be made in the petition: Matrimonial Causes Rules 1977 (S.I.1977 No.344) r.68(1). Leave is necessary to make any such application subsequently: ibid., r.68(2).

155 Rather than when the divorce was granted (i.e. decree absolute, not decree nisi). The reason for this choice is that until the foreign divorce became effective the English court might itself have entertained divorce proceedings (as in Torok v. Torok [1973] 1 W.L.R. 1066; para. 10, above). A further alternative would be the date when the foreign proceedings were started; but this has no particular significance in terms of principle, and the date could in some cases be uncertain, especially in cases of extra-judicial divorces where there might be no reliable evidence as to dates.

34. It seems at first sight attractive in principle to require the jurisdictional criteria to be satisfied at the time when the foreign divorce decree became effective; it would accordingly not suffice if they were only satisfied at the later date when the application in England was made for financial relief. The question is whether the divorce case could properly have come within the competence of the English courts, and it could clearly have done so if the divorce proceedings might have been started here at a time when the marriage still subsisted; equally (it would seem) the fact that the jurisdictional criteria for divorce happened to become satisfied, perhaps many years after the marriage, would be irrelevant in establishing the necessary connection between the marriage and this country. We see the attractions of this reasoning, but nevertheless consider that the adoption of such a rule as the exclusive test for jurisdiction could, particularly in the case of extra-judicial divorces, confront the English courts with precisely those legal problems which have given rise to criticism of the existing law. We consider these problems in the next paragraph.

35. The facts of Quazi v. Quazi[156] illustrate the problems which would ensue from the adoption of a rule conferring jurisdiction to hear applications for financial relief after a foreign divorce only in cases where the English court would have had jurisdiction to hear a divorce petition at the time when the foreign divorce became effective. In Quazi v. Quazi[157] the parties were Muslim nationals of Pakistan who had married in India in 1963. In 1968, by which time they had become resident and

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156 [1979] 3 W.L.R. 833.

157 Ibid.

domiciled in Thailand, they there went through an extra-judicial Islamic divorce. However, they continued to live under the same roof and maintained the outward appearance of marriage until 1972. In 1973 the husband came to London with the child of the marriage, and bought a house in Wimbledon. In 1974 the wife flew to London "and turned up at the husband's house unannounced at midnight. She lived separately from the husband in his house and refused to accept the 'true role of a Muslim wife'."[158] Subsequently the husband flew to Pakistan, and there pronounced talaq before witnesses. The wife continued to reside at the house in Wimbledon up to the time of the English court hearing of the husband's petition for a declaration that the marriage had been lawfully dissolved. In July 1978 Wood J. held that the marriage had been dissolved in 1968 by the Thailand divorce; in April 1979 the Court of Appeal held that neither the Thailand nor the Pakistan divorce were entitled to recognition; in November 1979 the House of Lords held that, if the marriage were still subsisting in 1974,[159] the Pakistan divorce had then validly dissolved it.

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158 Ibid., at p.842 per Lord Salmon.

159 The House of Lords did not determine the validity of the Thai divorce because

> "... the validity of a divorce by khula entered into in Thailand by Pakistani nationals who are domiciled there, is not a question that is very likely to require consideration by an English court in any subsequent case. It depends on the domestic law of Thailand, the Thai rules of conflict of laws, the application by the Thai courts of the doctrine of renvoi, and under that doctrine the applicability of the Muslim Family Laws Ordinance 1961 of Pakistan to consensual divorces. These are questions of fact to be decided by an English court on expert evidence of the foreign law concerned. In the instant case the expert evidence on these matters was inadequate, conflicting and confusing ..."

ibid., at p.836 per Lord Diplock. The validity of the Pakistan divorce was of wider public importance

> "in view of the number of Pakistani nationals who are settled in the United Kingdom either accompanied or unaccompanied by their wives":

ibid., at p.835.

36. The relevance of the facts of this case to the present argument is this. The case was said, both in the Court of Appeal[160] and House of Lords,[161] to illustrate the need for the courts to have power to make financial orders in favour of United Kingdom residents without having to determine the validity of foreign divorces.[162] Yet suppose that the reform designed to remedy this mischief required the court dealing with the application for financial relief to be satisfied that the English court would have had jurisdiction to entertain divorce proceedings at the date when the foreign decree took effect. This condition would certainly not have been satisfied if the marriage had been effectively dissolved by the Thai divorce, since at that time neither husband nor wife had ever been resident in this country, much less had a domicile here; but it might well have been satisfied at the time of the Pakistan divorce, since at that time the husband had presumably been habitually resident here throughout the previous year.[163] In order for the court to decide whether it had jurisdiction to hear the wife's claim - in effect for some share in a small house in

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160 See [1979] 3 W.L.R. 402, 405 per Ormrod L.J.

161 See [1979] 3 W.L.R. 833, 841, 850 per Viscount Dilhorne and Lord Scarman respectively.

162 Which could (as in that case) involve the expenditure of large sums of public money and "a disproportionate amount of intellectual effort"([1979] 3 W.L.R. 402, 404 per Ormrod L.J.) in conducting an "immense lawsuit ... requiring our courts to consider the family law of Islam" ([1979] 3 W.L.R. 833, 849 per Lord Scarman.)

163 Domicile and Matrimonial Proceedings Act 1973, s.5(2)(b). It is not clear where the husband was domiciled at the time of the Pakistan divorce. It was held at first instance that at that date the husband had abandoned his Thai domicile of choice but had not then formed the intention to continue to live in England, with the result that his domicile of origin in India revived: see [1979] 3 W.L.R. 833, 851. The Court of Appeal, however, held that the husband had at the time of the Pakistan divorce acquired a domicile in England: see [1979] 3 W.L.R. 402, 414.

Wimbledon[164] - it would thus be necessary for it to resolve precisely the question which absorbed so much time in the earlier stages of Quazi v. Quazi,[165] that is: was the marriage effectively dissolved by the Thai divorce (in which case, under the proposal now being considered, the court would have no jurisdiction to hear the wife's application), or did it survive until the Pakistan divorce? Furthermore, it would not require much alteration of the facts in Quazi v. Quazi[166] to make it questionable whether the court would have had jurisdiction to entertain divorce proceedings at the time of the Pakistan divorce. If, for example, the husband had not at the time when it became effective been habitually resident here for one year immediately before the divorce, the jurisdiction could only have been founded on his domicile - and questions of domicile, as in Quazi v. Quazi itself,[167] are often very difficult to resolve. We thus have no doubt that it could well frustrate the purpose of the proposed reform to require an applicant to establish that the English court would have had jurisdiction to entertain divorce proceedings at the date of the foreign divorce, since we think it probable that cases in which such a test would involve the English court in determining which of several foreign divorces was effective might by no means be uncommon. Moreover even where there is no multiplicity of divorces there may be a number of cases where there is no connection with this country until after the foreign divorce; in some such cases, where a real connection arises subsequently, a court should be empowered to entertain proceedings.

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164 Quazi v. Quazi [1979] 3 W.L.R. 833, 835 per Lord Diplock.

165 [1979] 3 W.L.R. 833.

166 Ibid.

167 Ibid., at p.851; see n. 163, above.

37. Accordingly we do not favour the adoption of a rule conferring jurisdiction to entertain proceedings for financial relief after a foreign divorce only where the English court would have had jurisdiction to entertain divorce proceedings at the time when the foreign divorce became effective. The question therefore arises whether the jurisdictional rule should instead be that the court should have jurisdiction to entertain applications for financial relief only if the court would at the time of that application have had jurisdiction to entertain divorce proceedings had the marriage still been subsisting. Such a rule would in fact permit applications in cases where the marriage had no connection at all with this country (as where a spouse came here for the first time after a foreign divorce) but in other cases (albeit perhaps rare) it would exclude deserving applicants. Suppose, for example, that a husband, who has lived in this country with his wife for many years, divorces her by talaq pronounced on a temporary visit to Pakistan with his wife in circumstances such that the validity of the divorce would be recognised in England. Suppose further that the wife in response to family pressures remains in Pakistan while the husband decides not to return to England, but finds work in, say, the Persian Gulf, leaving the former matrimonial home in the occupation of relatives of the husband and the children of the marriage. It seems to us that it might well be appropriate for the court to exercise its property adjustment powers over the former matrimonial home, at the wife's instance; yet it could well prove difficult to satisfy the proposed jurisdictional test in such a case. The wife would, under the proposal now being considered, need to show that she or her husband remained domiciled or habitually resident here. It seems doubtful whether either condition could be satisfied in the case we have just outlined. We believe that a case of this kind should be covered by our proposals, and we do not therefore favour limiting the jurisdictional rules to domicile or habitual residence in England at the time when the application for financial relief is made.

38. We are therefore of the view that the analogy of the divorce rule is acceptable if, but only if, it suffices that the criteria of domicile or habitual residence be satisfied either at the date when the foreign divorce became effective or at the time of the subsequent application for financial relief. On this basis it would follow that the court should in our view have jurisdiction to entertain proceedings for financial relief after a foreign divorce

(i) if either party was domiciled in England and Wales either at the date when the foreign decree became effective or the date when application is made for financial relief; or

(ii) if either party was habitually resident in England and Wales throughout the period of twelve months before the foreign decree became effective or before the date of the application for relief.

(b) Other possible jurisdictional criteria

39. It may be said that the test discussed above would not cover all the cases in which there might be a sufficient connection between the parties and this country to justify conferring jurisdiction on our courts. If this were so, hardship might be caused to those who were unable to bring proceedings here, and we have therefore considered two other possible jurisdictional tests. Under these the English court would have jurisdiction:

(i) if both parties were habitually resident in this country at the date of the application, or had been so resident for a specified period during the marriage; or

(ii) if either party were habitually resident in this country at the date of the application, provided that there was or had been a matrimonial home here.

We consider these in turn.

(i) Both parties habitually resident in this country at the date of the application, or for a specified period during the marriage.

40. If there were a requirement that both parties should be habitually resident in this country at the date of the application the worst cases of "forum-shopping" would be eliminated. Such a jurisdictional test would at least serve to show that the parties (albeit not necessarily their marriage) had some real and substantial connection with this country. Furthermore, if it were a pre-requisite that the respondent be habitually resident here, there would be greater reason to hope that any order for financial relief would in practice be enforceable against him. Against these advantages, however, has to be set the fact that any such test, if it were to be the sole jurisdictional criterion, might exclude meritorious cases, For example, suppose that the husband had left England at the time of the divorce, and did not intend to return. Why (it might be said) should the English court not have power to make orders relating to the former matrimonial home or other property situated here, or to make orders (either as to property adjustment or financial provision) which could be enforced abroad?

41. A variant of this proposal would be to require habitual residence for a specified period (perhaps twelve months) by both parties as husband and wife during the marriage. This proposal would go some way to ensure that the marriage had had some connection with this country, but again there seem to us

to be objections to it as the sole jurisdictional criterion. First, such a test could exclude cases in which it might seem appropriate to grant relief. For example, suppose that a husband left his wife in their native country when he came here, perhaps promising that he would send for her when he had become established. It would seem to us wrong to deprive the wife of access to the English courts if the husband, having built up property in this country, divorced her abroad. Furthermore, in cases of extra-judicial divorces - (such as Quazi v. Quazi[168] the facts of which we have given above)[169] the English court might have to decide which (if any) of several divorces had been effective, because on the answer to that question might depend the answer to the question whether the parties had lived here during the "marriage", or whether the residence had only started after the effective dissolution of the marriage. Although, therefore, we think that the test based on habitual residence during the marriage would indicate some connection between the marriage and this country, we do not consider that it would be satisfactory as an exclusive jurisdictional test.

42. On the face of it a more attractive proposition is that the test of habitual residence for a specified period during the marriage should be a jurisdictional test alternative to the divorce analogy.[170] (It would be superfluous to set up an alternative test based on habitual residence at the time of the application since that test exists in the divorce analogy.[171]) Such an additional basis of jurisdiction would serve to cover a case where the parties had been resident in this country for most of their matrimonial life but had left this country more than a year before the start of the foreign divorce proceedings, perhaps leaving assets here. It might be said that in such a case the English court should not be

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168 [1979] 3 W.L.R. 833.

169 At para. 35.

170 See para. 38,above.

171 See ibid.

prevented from dealing with matrimonial assets here unless the applicant (or respondent) were unable and willing to come to live in this country for the requisite period. There is, on the other hand, a weighty objection to this proposal. In the circumstances just set out an English court would not have had jurisdiction to hear divorce proceedings, nor to entertain an application for financial relief whether ancillary to divorce or during the subsistence of the marriage.[172] Should a party who has been divorced abroad be in a more advantageous position for invoking the English court's jurisdiction than one who seeks financial relief in any other circumstances? On balance, we think that a party whose connection with this country ceased before the foreign divorce proceedings ought to be required to establish habitual residence here[173] before applying for financial relief; the hardship likely to ensue would not we think be so great as to make it desirable to add to the jurisdictional rule which follows the analogy of divorce proceedings.

(ii) Either party habitually resident here at the date of the application, provided that there is or has been a matrimonial home here.

43. This test (which has enjoyed some judicial support)[174] would have enabled the courts to give relief in most of the reported cases which have so far come before the courts; and the requirement that there should have been a matrimonial home here, coupled with the requirement of habitual residence

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172 Periodical payments and lump sums can of course be awarded under other procedures e.g. under s.27 of the Matrimonial Causes Act 1973 or in the magistrates' court; but residence in this country is still required.

173 Or, in an appropriate case, rely on the other party's habitual residence.

174 See Quazi v. Quazi [1979] 3 W.L.R. 402, 405 per Ormrod L.J. (C.A.); [1979] 3 W.L.R. 833, 841 per Viscount Dilhorne and ibid., at p.850 per Lord Scarman (H.L.)

here at the time of the application, would ensure a reasonably substantial connection with this country. Nevertheless, we consider that, as an exclusive test, it is open to the objection that it could operate to exclude a meritorious case - as for example where both wife and husband stayed abroad after the foreign divorce, even though the wife would, if appropriate powers were available, have wished to be allowed to continue living in the matrimonial home. There might also be problems in deciding whether there had been a "matrimonial home" here in cases where the parties had lived under the same roof in this country. For example, could it be said that the property in which the parties had lived separate lives in Quazi v. Quazi[175] constituted a "matrimonial home"? Thus we do not regard this as a satisfactory exclusive test; and, if the divorce analogy[176] were accepted, the test now being discussed would be superfluous[177] because the English court would already have jurisdiction based on the habitual residence of either party.

44. We also considered a further variant, namely that the English court should be able to assume jurisdiction if there were, or had ever been, a matrimonial home in this country: the habitual residence of the parties would thus be ignored for the purpose of entertaining proceedings. We are inclined also to reject this proposal. Apart from its unsatisfactory features as an exclusive jurisdictional criterion and the criticism that "matrimonial home" might be

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175 [1979] 3 W.L.R. 833; see para. 35, above.

176 See para. 38, above.

177 Cf. the criticism in the previous paragraph of the test which would require both parties to be habitually resident here.

difficult to define for this purpose,[178] it is open to the strong objection that parties with very little connection with this country - who perhaps lived here for a few weeks in lodgings and were little more than "birds of passage" - would, subject to any discretion the court had in the matter,[179] be able to invoke the court's jurisdiction.

Provisional view on jurisdiction

45. We have come to the tentative conclusion that the most appropriate jurisdictional test for applications for financial relief after a foreign divorce, both in principle and as a means of restricting forum-shopping, is the analogy with jurisdiction in divorce proceedings. We are aware that there are cases which could fall outside this test where some might think that jurisdiction should be exercised - such as where the parties have resided in this country for a substantial period during the marriage or there is matrimonial property situated here; but our tentative view is that it is not too much to expect a party to establish habitual residence here in such a case before an application for relief is made. We would welcome views on this.

46. Our provisional recommendation therefore is that the court should have jurisdiction after a foreign divorce if, and only if, one of the grounds which we set out in paragraph 38 is satisfied. These are:

(i) if either party was domiciled in England and Wales either at the date when the foreign divorce became effective or the date when application is made for financial relief; or

178 See the previous para.

179 We deal with this in paras. 51-54, below.

(ii) if either party was habitually resident in England and Wales throughout the period of a year before the foreign divorce became effective or before the date of the application for relief.

We would however invite views especially on the possibility of an additional jurisdictional test based on habitual residence in this country as husband and wife for a specified period during the marriage.[180]

(4) Other ways of restricting the court's powers

47. In examining possible jurisdictional criteria, we have been heavily influenced by the consideration that deserving applicants with a real connection with this country might be denied access to our courts because of the jurisdictional rules adopted. The test which we provisionally favour, based on the analogy with divorce, seems to us to be satisfactory in this respect. However, it is open to the criticism that it would, in the absence of some other restriction, permit applications to be presented in circumstances which might well be thought to be wholly inappropriate. Take, for example, a case where a couple of German nationality, domicile, and residence were divorced in Germany in 1970. Let it be assumed, for the sake of argument, that the German court made no financial order because both parties were in comparable employment. Suppose that some years later the husband, having remarried, comes to work in this country in such circumstances that he can be said to have assumed habitual residence here. Is his former wife, who has no connection with this country at all, to be entitled to pursue him here

180 Discussed at paras. 41-42, above.

for financial provision and property adjustment orders? We recognise that such a situation could occur under the present law in a case where there had been no divorce at all: the wife could bring divorce proceedings (and seek financial relief) in circumstances similar to those we have just set out, relying on her husband's habitual residence here. Nevertheless we think that it is right to distinguish for this purpose between the case where the parties are still married and there is a legal duty of support (albeit perhaps difficult to enforce) and the case where a divorce has been obtained. After divorce (particularly in circumstances similar to those in the example given) there is a strong argument that the husband should reasonably be left to start a new life without the risk of a matrimonial claim being made against him at some time, possibly in the distant future.[181] In order to deter applicants from seeking an order where they have little link with this country but can nevertheless satisfy the jurisdictional criteria, and in order to avoid imposing on the courts insoluble problems of policy of the sort to which we have referred above,[182] we think that there should be some additional filter on applications. We now turn to examine the possibilities.

48. In considering restrictions on the availability of the powers which we have proposed, so as to confine relief to those cases with which it is appropriate for the English court to deal, it is important to take a view on

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181 It is true that in the example given the wife could in theory obtain a foreign order enforceable here but in practice this would be unlikely and in any event, the fact that the English courts might be asked to enforce an order does not mean that in such cases they should be empowered to make one.

182 At paras. 22-26.

the mischief at which the proposed legislation is aimed. In our view, the proposals should be concerned primarily to give a remedy in those exceptional cases where a spouse, usually the wife,[183] has been deprived of financial relief in circumstances where an English court might be driven to hold that it would be unjust to recognise the foreign decree. It follows that we consider the mischief at which the legislation should be aimed to be a narrow one. We do not think, in the absence of any international consensus on the principles which should govern financial provision, that the English courts should be unnecessarily exposed to the problems to which we have referred above.[184] In particular, we do not think that it would be appropriate to encourage applications to the courts of this country inviting them to act, in effect, as a court of appeal from courts of another country.

49. The three possible ways of providing a suitable check on inappropriate applications are, first, specific restrictions limiting eligibility to certain specified categories of applicant; secondly, conferring a discretion on the court with guidelines to indicate the circumstances to be taken into account in deciding whether an application should proceed or not; and, thirdly, a time restriction. We now examine these in turn.

(a) Specific restrictions

50. Under this proposal, the availability of financial relief after a foreign decree would be restricted to a limited class of applicant: for example, relief could be confined

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183 A husband is less likely in practice to be so deprived (especially by the effect of an extra-judicial divorce) though he might well require an order relating to property in England.

184 At paras. 22-26.

to those who were respondents in the foreign divorce proceedings (or to those who did not take part in the foreign proceedings) on the principle that a party who chooses a foreign forum for the divorce should not be allowed to switch to the English court for consequent financial relief. We have already given reasons[185] for not favouring the imposition of a rigid bar on the court hearing applications merely because a foreign court had made, or could have made, a financial order; and we think that these objections are generally applicable to restrictions of the type suggested. The imposition of such restrictions would, we think, almost inevitably result in cases of hardship where the court would be powerless to remedy a grave injustice; and, furthermore, such restrictions would usually involve the English court in an examination of the foreign law. Accordingly we do not favour any specific restrictions of this kind.

(b) A general discretion with guidelines

51. Having rejected proposals for a rigid bar on applications, we are left with the alternative of a flexible discretion, under which, although an application could be presented by any person able to satisfy the jurisdictional test that we have recommended,[186] such applications would be the subject of preliminary scrutiny by the court which would only allow the applicant to proceed if, in the circumstances, it was thought appropriate to do so. In the general formulation of the proposed discretion, we think that it should be made clear by express statutory provision that the object of the

185 At paras. 28 - 30, above.

186 At para. 46, above.

discretion is to provide for the "occasional hard case."[187] We consider, therefore, that the court should be given power to entertain an application for a financial provision or property adjustment order notwithstanding the existence of a valid foreign divorce, if in the light of all the circumstances of the case (and in particular certain specified circumstances)[188] the case would otherwise be one where serious injustice might arise. Our present inclination is not to favour any requirement that the applicant must establish the facts of the case to be "exceptional" since he may well belong to a religious or ethnic group in which it is not uncommon, for example, for a wife to be divorced abroad without having a right to claim financial relief.

52. Furthermore, we consider that specific guidelines should be formulated to assist the court in its discretion. We provisionally recommend that the court should be directed to consider, amongst the circumstances of the case, the following factors:

(a) The connection of the parties, and of the marriage, with this country and whether it would be appropriate[189] for English financial relief to be granted.

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187 See Finch v. Francis (21 July 1977) (unreported) per Griffiths J. (cited in Firman v. Ellis [1978] Q.B. 886, 904-5 per Lord Denning M.R.). The phrase was used by Griffiths J. to refer to the policy underlying the Limitation Act 1939, s.2D (under which a plaintiff may obtain leave to proceed with an action which would otherwise be statute-barred).

188 See the next para.

189 This question might arise, e.g., in relation to foreign assets. Enforcement difficulties might also arise: see para. 52 (3), below.

(b) The connection of the parties, and of the marriage, with the country where the divorce was obtained.[190]

(c) The entitlement of the applicant to apply for financial relief or to obtain any other financial benefit in consequence of divorce (such as deferred dower)[191] in the country where the divorce was obtained.

(d) In cases where a financial order had been made in the foreign country, whether it had been complied with or whether there are reasonable prospects of its being complied with;[192] and, in cases where no financial order had been made there, the reason for the applicant's failure to obtain such an order. (Such reasons might include difficulty for him in getting to that country, or his financial difficulty in prosecuting a claim there).[193]

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190 This is discussed in para. 27, above.

191 See n. 143, above.

192 Where a foreign order is in existence, it may be appropriate for the court when making, say, a periodical payments order to require the payee to undertake to discharge any foreign order which in effect is being duplicated by an English order. There may, we think, be a case for promoting reciprocal arrangements enabling courts to suspend or discharge the orders of foreign courts; but such a proposal would be outside the scope of this paper.

193 See Joyce v. Joyce and O'Hare [1979] Fam. 93.

(e) The prospects of any order made by a court in this country being enforceable; and, in particular, the availability of any property which might be the subject matter of such an order in this country (for example, the former matrimonial home) or the presence in this country of the party against whom an order is contemplated.

(f) The time which has elapsed since the foreign divorce, and the reasons for any delay in bringing the application in this country.[194]

We consider that these or similar guidelines would minimise the objections to making the exercise of the courts' powers dependent on the exercise of a judicial discretion and that this solution is the least unsatisfactory of those available. We would, however, welcome comments not only on the general question but also on the factors to which the court's attention should be specifically directed if the existence of a discretion is acceptable.

53. We are also of the view that the leave of a judge should be required[195] for an application to be allowed to

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194 See also para. 55, below.

195 This does not necessarily mean that there would have to be a two-stage process, i.e. a preliminary application for leave, followed (if leave were granted) by a hearing on the merits. In most cases the evidence needed for the substantive application would be required in order to enable leave to be obtained. The court would have inherent power to deal with individual cases in the most convenient way, e.g. by adjourning an application for leave to enable evidence to be filed by the other side; and by dealing with applications for leave inter partes and (if leave is given) with the substantive matters at the same hearing.

proceed, the ground for leave being that in all the circumstances the case was a proper one to be heard. We have considered whether applications should be confined to the High Court or be tried also in the county court. We recognise that there might be a case for conferring jurisdiction on the county court, particularly in view of the fact that comparatively small sums of money are likely to be involved.[196] We have to bear in mind however that, as with all discretionary jurisdictions, the powers we are proposing could give rise to the development of divergent practices. It is to overcome this difficulty, as far as possible, that we think that the discretion should only be exercisable by the Family Division of the High Court - and thus by a comparatively small number of judges who would acquire experience in the exercise of this jurisdiction.

54. Thus we are of the tentative view that discretion should only be exercisable by a High Court judge and that the terms of any order for financial provision or property adjustment should remain exclusively within the province of the High Court. Again we would welcome views.

(c) A time restriction

55. We have suggested that the time which has elapsed since the foreign divorce is one of the factors which should be considered by the court in exercising its discretion, subject to which the proposed jurisdiction should be available. We now consider whether it would be desirable to impose a separate requirement that an application should be made within a prescribed period (three years, for example), of

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196 Cf. the "modest prize at stake" in Quazi v. Quazi [1979] 3 W.L.R. 833, 850 per Lord Scarman.

the foreign decree. Such a time restriction would be designed to protect respondents against wholly stale claims, and can be supported by reference to the analogy of the English procedural rule[197] which requires application for financial provision and property adjustment orders to be contained in the petition, thus putting the respondent on notice of the claim. We see two major difficulties in the way of accepting such a proposal. The first is that, unless leave to bring proceedings outside the time limit could be obtained, it might prejudice a wife who had no notice of the proceedings or who perhaps assumed that they were invalid.[198] We accept, of course, that if the wife could show that she had received no notice of the proceedings this would be a ground on which she could resist recognition of the divorce;[199] but the object of the reform we are now considering is to reduce reliance on such attacks on validity to the minimum. Furthermore, we think that Quazi v. Quazi[200] provides evidence that there may well be cases where the parties proceed on the assumption that a particular procedure has been ineffective; if it subsequently turned out that their assumption was wrong it would be unfair to apply a rigid bar to financial relief based on the time which had elapsed. The second objection which we see to a time limit is that it could involve a court in having to determine (again, as in Quazi v. Quazi)[201] which (if any) of several proceedings for divorce has been effective. For these reasons we do not favour a fixed time limit; but if, contrary to this view, a time limit were to be imposed, the court would in our opinion have to have power to allow an application outside the permitted period in cases where it would be inequitable to enforce the time bar.

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197 Matrimonial Causes Rules 1977 (S.I.No. 344) r.68.

198 As in Quazi v. Quazi [1979] 3 W.L.R. 833: see below.

199 See para. 9, above.

200 [1979] 3 W.L.R. 833.

201 Ibid.

In our view it is more satisfactory to allow the time question merely to be relevant to one of the guidelines in the court's discretion.[202]

(5) Questions arising once an application is to proceed

(a) Choice of law

56. It is necessary to consider whether, if the court allows the application to proceed, it should be governed by English law, or some other law (such as the law of the place where the foreign divorce was obtained). We have no doubt that English law should be applied; any other solution would, we think, be unacceptable for three reasons, first, it might result in precisely that denial of effective relief which it is the object of the proposed reform to overcome. Secondly, it would be difficult to determine which other law would be appropriate. As we have already pointed out, the country of the divorce might not be the country with which the marriage had the strongest connection, and the determination of a "proper law" of the marriage is likely to be elusive. Thirdly, expense would, and difficulty could, arise in obtaining expert evidence of any foreign law which was or might be applicable.

(b) Orders which the court could make

57. If it is accepted that English law should be applied, we think that, in order to meet the variety of circumstances with which it may be faced, the court should be empowered to make any order that it could have made in divorce, nullity

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202 See para. 52 (f), above.

or judicial separation proceedings;[203] in deciding whether to exercise its powers, and if so in what manner, the court would follow the guidelines laid down in the Matrimonial Causes Act 1973.[204] The court would thus be obliged to take into account, amongst the circumstances of the case, the income, earning capacity, property and other financial resources of each of the parties, and these would obviously include any payments made consequent on the foreign divorce.

58. We have said that the court should have the full range of powers[205] to make financial provision and property adjustment orders conferred by the Matrimonial Causes Act 1973. We do not propose that there should be any statutory bar on the court making orders in relation to foreign assets of the respondent. We have already referred[206] to the case of Razelos v. Razelos (No. 2)[207] where the court made orders under section 17 of the Married Women's Property Act 1882,

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203 i.e. to order periodical payments (whether secured or not), lump sum, transfer and settlement of property, and variation of settlements: see Matrimonial Causes Act 1973, ss. 23,24. Financial orders in respect of children of the family could also be made. We also envisage that the provisions of the Matrimonial Causes Act 1973, s.37 (avoidance of dispositions) would be available if an application for financial relief were made under the jurisdiction now proposed; proceedings under s.37 may be brought simultaneously with other proceedings for relief and the jurisdictional and other criteria would be the same.

204 Sect. 25(1). These guidelines would of course operate in addition to the "preliminary" guidelines we have recommended in para. 52, above.

205 See n. 203, above.

206 At n. 102, above.

207 [1970] 1 W.L.R. 392.

inter alia, in respect of real property in Greece.[208] Under the divorce jurisdiction the law seems to be similar to that under the Married Women's Property Act 1882: as there is no statutory provision preventing the court from making an order relating to foreign property, the test is whether the order would be effective.[209] In Tallack v. Tallack and Broekema[210] for instance, the court refused to order the settlement of matrimonial property in Holland (the respondent being domiciled and resident in that country) when the evidence was that the Dutch courts would not give effect to such an order; the English court, moreover, could not enforce the order either by personal attachment or by ordering that the deed or conveyance be executed by some other person.[211] We do not therefore think that there is any need for a special bar on the making of orders relating to foreign assets in cases of applications following a foreign divorce. In many cases [212] the court would not make such an order, because any such order would be nugatory; a statutory bar on the court dealing with foreign property after a foreign divorce would not only be unnecessary, but could cause hardship where it appears that the order could be given effect to in the foreign country.[213]

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208 See ibid., at pp. 400 - 401.

209 See Hunter v. Hunter and Waddington [1962] P.1.

210 [1927] P. 211.

211 See Supreme Court of Judicature (Consolidation) Act 1925, s. 47.

212 See, e.g., Tallack v. Tallack, above; Goff v. Goff [1934] P. 107; Wyler v. Lyons [1963] P. 274.

213 In Razelos v. Razelos, above, Baker J. said "I...make an order in respect of [the Greek property] for what it may be worth... If the Greek courts will enforce such order, so much the better. If not, there is still the probability that [the husband] will return to England and the chance of enforcement in person..." (ibid., at p. 404).

(c) Recognition of the foreign decree

59. The mischief with which this Working Paper is concerned arises where a foreign divorce has terminated the marriage; if it has not done so, the appropriate relief would be for the applicant to petition in this country.[214] In principle, therefore, the question whether the foreign decree should be recognised would be one of the matters in the course of the application which would have to be proved. It is true that in order to determine this issue the court might have to make precisely that laborious enquiry into validity which has occasioned so much adverse comment in the past; but we do not think that it would be acceptable to allow the court to entertain an application for relief under our proposed jurisdiction merely on the basis that the marriage might have been validly terminated. Apart from other considerations, it is undesirable that the English courts should sanction a procedure under which there would remain doubt as to whether the parties were or were not married. We believe, however, that the issue of the recognition of the foreign decree is less likely to be contested than under the existing law. A husband who has obtained a foreign decree would be unlikely to impugn the jurisdiction by which he obtained it; and it would rarely be in the interest of the wife to deny the validity of the foreign decree[215] if she had a proper right to apply for financial relief.

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214 Or to apply under the Matrimonial Causes Act 1973 s. 27 on the ground of failure to maintain.

215 A wife would presumably be advised, at least in cases where the validity of the decree might be in doubt, to petition in the alternative for divorce or judicial separation, or to apply for financial provision under s.27 of the Matrimonial Causes Act 1973.

(6) Other rights lost by divorce

60. We should stress that the reform so far proposed would not by itself put the applicant in all respects in the same position as a person divorced in England, since such a person has, as we have seen,[216] rights under the Matrimonial Homes Act 1967 and the Inheritance (Provision for Family and Dependants) Act 1975 as well as a right to apply for relief under the Matrimonial Causes Act 1973.

61. We take the view that amendments of the Inheritance (Provision for Family and Dependants) Act 1975 would be appropriate to enable a person divorced abroad to qualify as a "former spouse" for the purpose of applications under that Act for financial provision from the estate of a deceased person who is domiciled in England and Wales at the time of death.[217] The Law Commission's Second Report on Family Provision on Death,[218] (the proposals of which were implemented by the 1975 Act) stated that, if it were proposed to consider extending the definition of "former spouse" in the way which we now propose, it would be necessary "to embark upon a much wider inquiry involving the whole question of how far the English courts should award maintenance to a former spouse after the dissolution... of the marriage abroad;"[219] and the Commission considered that such an inquiry fell outside the scope of that Report. We do not think that any such objection to extending the definition of "former spouse" applies in the present context, since the subject matter of this paper is concerned with this very inquiry. We would however welcome views.

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216 At para. 2, above.

217 See ss. 1(1) and (2) (b) of the 1975 Act.

218 (1974) Law Com. No. 61.

219 Ibid., para. 50.

62. We also invite views on whether amendment of the Matrimonial Homes Act 1967 would be desirable. Under that Act a spouse has certain rights in relation to the matrimonial home (which can be registered and thereby become enforceable against third parties), notably the right, if in occupation, not to be evicted by the other spouse except by court order; and the right, if not in occupation, to enter and occupy the property by court order.[220] Furthermore, the court may order the transfer of a protected or statutory tenancy on divorce or annulment.[221] Rights of occupation under the 1967 Act come to an end on divorce unless the court otherwise orders during the subsistence of the marriage;[222] thus it would be too late to invoke these rights after a foreign divorce became effective, and the power to transfer a tenancy on divorce would then no longer be exercisable.[223] There may therefore be a case for amending the legislation to enable a spouse's rights to be protected, notwithstanding a foreign divorce. However, this would involve somewhat complex legislation, and it may perhaps be considered that, under the proposals put forward elsewhere in this paper, the court

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220 Matrimonial Homes Act 1967, s.1(1) as amended.

221 i.e. as from decree absolute: ibid., s.7. The Law Commission in its Third Report on Family Property (1978) Law Com. No. 86 Book II paras. 2.38 - 2.41 recommended that the powers should be exercisable at any time after the grant of the decree (i.e. decree nisi) and that they should be exercisable in cases of judicial separation. Transfer of local authority lettings is not possible under the 1967 Act (see Law Com. No. 86, paras. 2.65 - 2.72 where no change in the law was recommended) but an order for transfer of such a letting is possible under s.24 of the Matrimonial Causes Act 1973: Thompson v. Thompson [1976] Fam. 25.

222 Matrimonial Homes Act 1967, s.2(2).

223 Orders can only be made between decree nisi and decree absolute: ibid., s.7(5). See also n.221, above.

will have adequate powers to protect the wife's occupation of the matrimonial home under the wide powers contained in the Matrimonial Causes Act 1973.[224]

(7) Financial relief following foreign decrees of nullity and legal separation

63. So far in this paper we have not distinguished between cases where the foreign decree is one of divorce, nullity or legal separation, but we must now consider the question whether there should be any difference between the case where the decree obtained abroad is one of divorce and where it is one of nullity or legal separation. Dealing first with nullity, we have already pointed out[225] that the grounds for recognition of foreign decrees are not governed by the Recognition of Divorces and Legal Separations Act 1971 and differ somewhat from those relating to divorce and legal separations.[226] This should not, however, in our view preclude an English court from being able to order financial relief merely because the marriage was validly annulled rather than dissolved (even in a case where the marriage was void rather than voidable) since the potential mischief is the same in each case. It should, however, be noted that in our view English law is unusual in conferring on the courts exactly the same financial powers in nullity proceedings as in divorce proceedings; in many countries the effect of holding that a marriage is void is to free the parties from all the incidents of marriage, including any

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224 e.g. by ordering a settlement of property or postponement of sale during the minority of a child of the family, as in Mesher v. Mesher (Note) (1973) [1980] 1 All E.R. 126.

225 See para. 14, above.

226 Ibid., where the nullity rules are outlines.

obligation to maintain. The possibility has therefore to be faced that there could be a number of applications for relief here in respect of void marriages by persons with little real connection with this country, and whose complaint was really with the doctrinal logic of their own legal systems. We doubt, however, whether such cases are likely to be numerically significant; and thus they can be left to be dealt with under the discretion we have recommended, as and when they arise.

64. The problem in relation to a (valid) foreign decree of legal separation is somewhat different. In such a case there is no formal bar to either party obtaining financial relief in this country since either party could take divorce proceedings here and thus bring into play the powers of the court to make orders for financial relief. For the person legally separated by a foreign order who does not seek a divorce for religious or other reasons the issue is, however, less straightforward. He or she could bring proceedings in this country on the ground of failure to provide maintenance,[227] but the court's powers in such proceedings are limited (compared with those available in divorce, nullity or judicial separation proceedings) since there is no power to make a property adjustment order. Although, therefore, we think that in most cases it would be unnecessary to provide a special right to apply for financial relief after a foreign decree of legal separation, we consider that there could be cases where a decree of legal separation was obtained in a country where the powers of property adjustment consequent on such a decree were less wide than in this country and the parties did not seek a divorce: hardship could arise in such cases if there were no power to grant the same financial relief as on divorce. On balance, therefore, we are of the provisional view that the power we have recommended

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227 Matrimonial Causes Act 1973, s.27.

in cases of foreign divorce and nullity should also extend to cases where there has been a foreign legal separation. Again comments would be welcome.

(8) Decrees obtained in the British Isles[228] outside England and Wales

65. We have considered whether the proposed jurisdiction to award financial relief should extend to cases where a decree of divorce or nullity was obtained in Scotland, Northern Ireland, the Channel Islands or the Isle of Man. These countries all have their own legal systems and the grounds for matrimonial relief, and the financial provision orders available, differ from country to country. The ground for divorce in those jurisdictions (apart from Jersey)[229] is substantially similar to that in England and Wales[230] and the basis upon

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228 The term does not include the Republic of Ireland: most modern matrimonial legislation defines the British Isles ("British Islands") as being the United Kingdom, the Channel Islands and the Isle of Man; see e.g. the Recognition of Divorces and Legal Separations Act 1971, s.10(2). The proposals we have made should in our view apply where there has been a decree of nullity or judicial separation (divorce a mensa et thoro) in the Irish Republic (divorce not being available there) in the same way as where there has been a decree in any other overseas country.

229 In Jersey, divorces are based on matrimonial offence grounds (under the Matrimonial Causes (Jersey) Law 1949 as amended); but under the Matrimonial Causes (Amendment No.5) (Jersey) Law 1978, 2 years' living apart with consent and 5 years' living apart now also constitute grounds for divorce.

230 See Divorce (Scotland) Act 1976; Matrimonial Causes (Northern Ireland) Order 1978 (S.I. 1978 No. 1045); Matrimonial Causes (Guernsey) Law 1939 and Matrimonial Causes (Amendment) (Guernsey) Law 1972; Judicature (Matrimonial Causes) Act 1976 (Isle of Man).

which financial relief is granted seems also to be similar.[231] Moreover financial provision orders made in Scotland[232] and Northern Ireland,[233] and periodical payments and lump sum orders[234] made in Guernsey, the Isle of Man and Jersey can all be registered and enforced in England.[235] There are, however, some significant differences in the powers of the courts in these countries to make orders affecting capital. The courts in Northern Ireland[236] and the Isle of Man[237] have

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231 In Scotland, Guernsey and Jersey there are no detailed statutory guidelines equivalent to s.25 of the Matrimonial Causes Act 1973. The courts in those countries are, however, required to have regard to all the circumstances of the case. Northern Ireland and the Isle of Man have statutory guidelines identical to those in England and Wales. As to Scotland see also n.242, below.

232 Maintenance Orders Act 1950, s.16(1) and (2)(b) as amended.

233 Ibid., s.16(1) and (2)(c) as amended.

234 Lump sum orders are dealt with in separate legislation: see the next footnote.

235 Periodical payments orders made in the Channel Islands and the Isle of Man are enforceable under the Maintenance Orders (Facilities for Enforcement) Act 1920, ss. 1 and 12(1) and Order in Council (S.I. 1959 No.377, Sch. 1). (The Maintenance Orders (Reciprocal Enforcement) Act 1972 repeals and replaces the 1920 Act but the repeal provision of the 1972 Act [s.22(2)] has not yet been implemented.) Lump sum orders are enforceable under the Foreign Judgments (Reciprocal Enforcement) Act 1933: see s.1(2) and the relevant Orders in Council (S.I. 1973 Nos. 610, 611 and 612 which apply respectively to Guernsey, the Isle of Man and Jersey). They are not "maintenance" orders within the meaning of the 1920 or 1972 Acts.

236 See Matrimonial Causes (Northern Ireland) Order 1978 (S.I. 1978 No. 1045) Art. 26 and 27.

237 See Judicature (Matrimonial Causes) Act 1976 (I.O.M.) s.24.

the same powers to make property adjustment orders[238] as do the courts in England and Wales; and the courts in Guernsey[239] and Jersey[240] have powers which are in most important respects[241] similar to those in England and Wales. In Scotland, however, the courts have no power to order the transfer of property on divorce.[242]

66. It would nevertheless in our view be inappropriate to allow those divorced elsewhere in the British Isles to apply to the courts in England and Wales for financial orders; there will be few if any cases in which a person divorced in another part of the British Isles will have suffered the "serious injustice" which we believe it should be necessary to establish as a condition precedent to the exercise of the powers we propose.

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238 i.e. transfer of property; settlement of property; variation of ante-nuptial or post-nuptial settlement, or extinction or reduction of a party's interest thereunder: see Matrimonial Causes Act 1973, s.24(1).

239 The 1972 amendment (see n. 230, above) does not cover ancillary relief but under the Matrimonial Causes (Guernsey) Law 1939 (Art. 46) there is provision for settling or vesting matrimonial property in such proportions as the court may direct.

240 In 1973 the Matrimonial Causes (Jersey) Law 1949 (see n. 229, above) was amended to give the divorce court power to transfer or settle real or personal property: Art. 28 of the 1949 Law as amended.

241 Especially the power to order transfer or settlement of property.

242 Under the Divorce (Scotland) Act 1976 the principal relief on divorce consists of periodical allowance, capital sum and variation of settlement (s.5). The Scottish Law Commission is considering proposals to confer more extensive powers, including those of ordering transfer of property: see Scot. Law Com. Memo. No. 22, Aliment and Financial Provision (1976) para. 3.20.

PART IV: SUMMARY OF PROVISIONAL RECOMMENDATIONS

67. We now set out a summary of our provisional recommendations. Comments and criticisms are invited.

(1) English courts should be given power to entertain applications for financial provision and property adjustment orders notwithstanding the existence of a prior foreign divorce which is recognised by our courts. (paragraph 22)

(2) There should be no bar on the court hearing an application for financial relief on the ground that a foreign court could have made, or has made, a financial order. (paragraphs 28 to 30)

(3) The English court should have jurisdiction if one or more of the following tests is satisfied:

(i) if either party was domiciled in England and Wales either at the date when the foreign divorce became effective or the date when application is made for financial relief; or

(ii) if either party was habitually resident in England and Wales throughout the period of twelve months before the foreign divorce became effective or before the date of the application for relief. (paragraphs 45 and 46)

(4) Views are invited as to whether the English court should additionally have jurisdiction where the parties habitually resided together in this country as husband and wife for a specified period during the marriage. (paragraph 46)

(5) An applicant should be required to obtain the leave of a judge to apply for financial relief; in deciding whether or not to grant leave, the court should have regard to detailed guidelines.

(paragraphs 51 to 52)

(6) We tentatively propose that the High Court should have exclusive jurisdiction to hear such applications.

(paragraphs 53 to 54)

(7) There should be no special time or other restrictions on applications for financial relief.

(paragraphs 50 and 55)

(8) English law should govern the principles on which a court grants financial relief under these recommendations.

(paragraph 56)

(9) The court should be able to make any financial order that it might have made in English divorce proceedings and should exercise its powers in accordance with the guidelines laid down in section 25 of the Matrimonial Causes Act 1973.

(paragraph 57)

(10) There should be no statutory bar preventing the court making orders relating to foreign assets.

(paragraph 58)

(11) The court should be required to be satisfied that the foreign decree should be recognised here.

(paragraph 59)

(12) The Inheritance (Provision for Family and Dependants) Act 1975 should be amended in order to enable a person divorced abroad to be treated as a "former spouse" for the purpose of applications under the Act.

(paragraph 61)

(13) Views are invited as to whether the Matrimonial Homes Act 1967 should be amended to give rights thereunder to spouses whose marriages have been terminated abroad.

(paragraph 62)

(14) The same rules should apply after a foreign decree of nullity or legal separation as after a foreign divorce decree.

(paragraphs 63 and 64)

(15) There should be no right to apply to the English court for financial relief after a decree of divorce, nullity or judicial separation has been obtained elsewhere in the British Isles.

(paragraph 66)

APPENDIX

RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS[1]

(1) Periodical payments

1. There is no power at common law to enforce a foreign order for periodical payments because such an order is not considered "final and conclusive"[2] by the English courts. Two statutes, however, now govern the reciprocal enforcement of many maintenance [3] orders: the Maintenance Orders (Facilities for Enforcement) Act 1920, and the Maintenance Orders (Reciprocal Enforcement) Act 1972.

(a) The 1920 Act

2. This Act, which will eventually be replaced by the 1972 Act, [4] applies to the Commonwealth countries listed in the next paragraph. Under it a maintenance order made in any country to which the Act extends may be registered in England

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1 We deal here only with reciprocal enforcement between courts in England and Wales and countries outside the British Isles. For arrangements within the British Isles, see para. 60 of the paper; and P.M. North, The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland (1977).

2 This is because such an order can be revoked or varied: see Harrop v. Harrop [1920] 3 K.B. 386. An order is however enforceable as regards accrued instalments if revocation or variation of the order is not possible in respect of those accrued sums: Beatty v. Beatty [1924] 1 K.B. 807. See also Foreign Judgments (Reciprocal Enforcement) Act 1933, s.1(2).

3 Defined by s.21 of the Maintenance Orders (Reciprocal Enforcement) Act 1972 to cover periodical payments but not lump sum orders.

4 See paras. 4-10.

and Wales (or Northern Ireland)[5] and vice versa.[6] Furthermore, a provisional maintenance order may be made[7] by a magistrates' court in England against a person resident in a country to which the Act applies (whether or not the cause of complaint arose in England);[8] it is then up to the court in the other country to decide whether or not to confirm the order.[9] Likewise, provisional orders made in the other country can be confirmed here.[10]

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5 Sect.1, which applies to courts of superior and inferior jurisdiction. Where a court of superior jurisdiction made the order it is registered in the High Court; in the other cases the order is registered in the magistrates' court.

6 Sect.2. The object of ss.1 and 2 is to provide for cases where the court would have had jurisdiction to make an order but no prospect (without these provisions) of enforcing it. Registration is an automatic administrative matter.

7 Under Sect.3.

8 Collister v. Collister[1972] 1 W.L.R. 54 (where the parties' matrimonial life was in the Isle of Man.)

9 This is known as the "shuttlecock" procedure: see Pilcher v. Pilcher [1955] P.318, 330 per Lord Merriman P. There are thus two hearings; the first will normally be in the absence of the defendant (otherwise an ordinary matrimonial order could be made); the second normally in the absence of the complainant. The object is to provide for cases where otherwise the court would have been unable to make the order because the defendant was not present and could not be served with process within the jurisdiction. Confirmation (unlike registration) is discretionary: **see Pilcher** v. Pilcher, ibid.

10 Sect.4.

3. Although the 1920 Act is to be repealed by the 1972 Act, the repeal provision of the 1972 Act [11] has not yet been implemented, and the 1920 Act will remain in force until every country or territory subject to it has been designated a "reciprocating country" under the 1972 Act. The following are the countries currently subject to the 1920 Act:[12]

Antigua
Australia:
  Territory of Cocos (Keeling) Islands
  Territory of Christmas Island
Bahamas
Bangladesh
Belize
Botswana
Cayman Islands
Cyprus
Dominica
Falkland Islands and Dependencies
Gambia
Gilbert and Ellice Islands
Grenada
Guyana
Jamaica
Lesotho
Malawi
Malaysia
Mauritius
Montserrat
Newfoundland and Prince Edward Island
Nigeria
Papua/New Guinea
Sri Lanka
St Christopher, Nevis and Anguilla
St Helena
St Lucia
St Vincent
Seychelles
Sierra Leone
Solomon Islands
Somalia
Swaziland
Trinidad and Tobago
Uganda
Virgin Islands
Yukon Territory
Zambia
Zimbabwe

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11 Sect. 22 (1).

12 See the (consolidating) Order in Council (S.I. 1959 No. 377); and the Revocation Orders of 1974 (S.I. 1974 No. 557), 1975 (S.I. 1975 No. 2188) and 1979 (S.I. 1979 No. 116). Changes since 1959 in the countries' titles and geographical areas are reflected in this list.

(b) The 1972 Act

4. Part I of this Act, like the 1920 Act, provides for the automatic enforcement of orders[13] and for the provisional order ("shuttlecock") procedure[14] but is wider both in extent and scope. As to extent, it applies to non-Commonwealth as well as Commonwealth countries: any country prepared to accord reciprocal facilities to United Kingdom orders may be designated a "reciprocating country".[15] As to scope, Part I provides (as the 1920 Act does not) for the "shuttlecock procedure" to be applied to the variation and revocation of orders.[16]

5. Part I of the Act assumes that reciprocating countries will have similar maintenance laws because the court in the reciprocating country must be able to understand the foreign law with which it is dealing and must have a similar procedure.[17] Moreover, the law applied is that of the country which made the order, even under the provisional order procedure: thus, in the course of proceedings in country Y to confirm a provisional order made in country X, if the defendant establishes a defence under the law of country X, the court in country Y must refuse to confirm the order. If the laws in the two countries were radically different the registration and confirmation procedures would not work.

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13 Sects. 2 and 6; see para. 2, above. Registration here is in the magistrates' court in the area where the payer lives.

14 Sects. 3,7. A summary of the evidence is sent: s.3(5)(b); s.7(2)(a).

15 Sect. 1.

16 Sects. 5,9: cf. Pilcher v. Pilcher [1955] P.318.

17 See P.M. Bromley, Family Law, 5th ed. (1976)p.569.

6. The following are the countries currently designated under Part I of the 1972 Act as "reciprocating" countries:[18]

Alberta
Australian Capital Territory
Barbados
Bermuda
British Columbia
Fiji
Ghana
Gibraltar
Hong Kong
India
Kenya
Malta
Manitoba
New Brunswick
New South Wales
New Zealand
Norfolk Island
Northern Territory of Australia
North-west Territories of Canada
Nova Scotia
Ontario
Queensland
Saskatchewan
Singapore
South Africa
South Australia
Tanzania (except Zanzibar)
Tasmania
Turks and Caicos Islands
Victoria
Western Australia

7. We understand from the Home Office that between 1977 and 1979 on average 186 maintenance orders each year were transmitted[19] (under both the 1920 Act and Part I of the 1972 Act) from England and Wales to other countries:[20] and 124 maintenance orders were similarly transmitted to this country from abroad.

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18 See Orders in Council S.I. 1974 No. 556; S.I. 1975 No. 2187; and S.I. 1979 No. 115.

19 Including both the automatic transmission and provisional order procedures: see para. 2, above.

20 Excluding the Republic of Ireland, as to which see para. 10, below. Between 1977 and 1979 there were on average annually 55 orders transmitted from England and Wales to the Irish Republic, and 23 orders transmitted the other way.

8. Part II of the 1972 Act gives effect to the United Nations Convention on the Recovery Abroad of Maintenance (1956). It provides that any country to which the convention extends may be designated a "convention country." [21] The procedure is entirely different from the other procedures already described because it enables a person resident in one country to have a maintenance claim transmitted to the country where the defendant resides: no order is made in the first country, which simply sends the application to the other convention country.[22] Although evidence is taken in the court of the country where the applicant lives, this accompanies the application and forms, so to speak, the "complaint" upon which the foreign [23] court may make the order. The law applied is of course that of the country where the defendant lives; as we have seen, [24] this is in contrast to both the automatic registration and provisional order procedures under Part I, where the law applied is that of the country where the applicant lives. Part II, which is designed to apply to countries with legal systems different from ours (unlike Part I), may be seen as less ambitious than Part I under which orders can be made and enforced abroad.[25]

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21 Sect. 25. For a list of countries currently designated, see the next para.

22 Sect. 26. In England and Wales the magistrates' clerk in the area where the complainant lives acts as forwarding agent.

23 The provisions are of course reciprocal so that this country may be the "foreign" country.

24 At para. 5, above.

25 This is perhaps shown clearly by the fact that reciprocal arrangements between the United Kingdom and certain countries (e.g. France) that signed the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (see n.29, below), which formerly existed pursuant only to Part II of the Act, have now been brought also within the Part I scheme. We understand that, although Part II continues to apply in such cases, Part I arrangements will effectively supersede those under Part II.

9. The following countries are currently designated as "convention countries" under Part II of the 1972 Act: [26]

Algeria
Austria
Barbados
Belgium
Brazil
Central African Republic
Chile
Czechoslovakia
Denmark
Ecuador
Finland
France (including the overseas departments of Guadeloupe, Guiana, Martinique and Reunion)
French Polynesia
New Caledonia and Dependencies
St. Pierre and Miquelon
Germany, Federal Republic of, and Berlin (West)
Greece
Guatemala
Haiti
Holy See
Hungary
Israel
Italy
Luxembourg
Monaco
Morocco
Netherlands (Kingdom In Europe and Netherlands Antilles)
Niger
Norway
Pakistan
Philippines
Poland
Spain
Sri Lanka
Sweden
Switzerland
Tunisia
Turkey
Upper Volta
Yugoslavia

We understand from the Home Office that, between 1977 and 1979, on average 41 maintenance claims under Part II of the 1972 Act were transmitted each year from England and Wales to another convention country; and 35 claims were similarly transmitted to this country.

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26 See the Orders in Council S.I. 1975 No. 423 and S.I. 1978 No. 279.

10. There is also provision under the 1972 Act for special reciprocal arrangements to be made with individual countries.[27] Under the Act there are at present special reciprocal arrangements with the Republic of Ireland,[28] with signatory countries to the Hague Convention,[29] and with certain United States jurisdictions.[30] It should also be noted that the E.E.C. Judgments Convention[31] when in force in this country will provide for the reciprocal enforcement of periodical payments orders[32] as between the United Kingdom and the

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27 Sect.40. The object of the special arrangements is to provide for different procedures and modifications to be made where necessary; see the Orders in Council referred to in the following footnotes. Sect. 40 allows for arrangements under either Part I or Part II to be made.

28 See Reciprocal Enforcement of Maintenance Orders (Republic of Ireland) Order 1974 (S.I. 1974 No. 2140), which applies Part I of the Act in a modified form.

29 i.e. the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973). By Order in Council (S.I. 1979 No. 1317) the provisions of Part I of the Act (in a modified form) were applied in respect of the following convention countries: Czechoslovakia, France, Norway, Portugal, Sweden and Switzerland.

30 See Recovery of Maintenance (United States of America) Order 1979 (S.I. 1979 No. 1314). The Order applies Part II of the Act to the following States:

Arizona	Louisiana	North Dakota
Arkansas	Maine	Ohio
California	Michigan	Oklahoma
Colorado	Minnesota	Oregon
Connecticut	Montana	Pennsylvania
Florida	Nebraska	Texas
Idaho	Nevada	Vermont
Illinois	New Hampshire	Virginia
Indiana	New Mexico	Washington
Kansas	New York	Wisconsin
Kentucky	North Carolina	Wyoming.

31 i.e. the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, signed in 1968 by the original 6 members of the E.E.C. and to which, in an amended form, the United Kingdom, Ireland and Denmark are to become parties.

32 See also the next para. in relation to the other financial relief orders enforceable under the convention.

other member states of the E.E.C.

(2) Lump Sums

11. Lump sums, as we have seen, do not come within the ambit of the 1920 or 1972 Acts. They are however enforceable both at common law (because they are final and conclusive)[33] and under Part II of the Administration of Justice Act 1920 under which a scheme of registration of foreign money judgments applies to a wide range of Commonwealth countries; and also under the Foreign Judgments (Reciprocal Enforcement) Act 1933,[34] which applies a similar, but broader scheme, to a smaller range of both Commonwealth and non-Commonwealth countries. As between the United Kingdom and other member states of the E.E.C., the Judgments Convention to which we have referred will replace the provisions of the 1933 Act and will, it seems, cover all financial relief[35] orders made by courts in the member states of the Community.

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33 See para. 1, above.

34 Sect. 1(2).

35 Including, it would seem, property adjustment orders, at any rate in so far as they have a "maintenance" element: see Arts. 1 and 5 of the convention (Official Journal of the European Communities No. L304/78, 30.10.78); and J.H.C. Morris, The Conflict of Laws, 2nd ed. (1980) p.82.

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