CONFLICTS IN DIVORCE JURISDICTION AND RECOGNITION

by

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In an effort to adapt the law to modern society, the courts have expanded the bases on which divorces obtained abroad will be recognized in Canada and Parliament has modified the domestic rules for the assumption of jurisdiction in divorce petitions. This has resulted in a significant increase in uncertainty and inconsistency in the law, which is evidenced in the large volume of litigation in this area.

Analysis of the grounds for recognition of foreign divorces gives rise to a further concern, that is, the effect of a foreign divorce on the right of a spouse or former spouse to financial support. The chief unresolved problem, at least as far as Canadian divorce legislation is concerned, is the protection of a spouse's right to financial support in Canada when a foreign divorce is recognized here. Furthermore, if a foreign divorce is not recognized here, its effect on the right to financial support seems to be somewhat uncertain.

Having considered the objectives of the law in this field, together with the current law and alternatives available to the legislature, it is submitted that law reform is desirable. Specific recommendations are formulated at the end of each of the three parts of the thesis.
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PART 1 - JURISDICTION

CHAPTER 1

A. INTRODUCTION

The question to be answered in this part is: on what basis should courts in Canada exercise jurisdiction over petitions for divorce? There is probably no jurisdictional problem in the majority of cases as both parties to the petition will be Canadians, domiciled and resident in the province in which jurisdiction is sought. However, the minority should not be ignored in this context. Canada has a large number of immigrants, who, in law, may or may not be domiciled where they live and wish to petition for divorce. In addition, society has become increasingly mobile and many people move freely from province to province, or from country to country, for employment and a variety of other reasons.

The question then becomes: when is there a sufficiently close connection with the particular province (or Canada as a whole) to justify the assumption of jurisdiction to dissolve the marriage? The simple answer seems to be: when the parties have lived in the province for a reasonable amount of time. However, the question cannot be answered fully without a detailed exposition of the existing law and the various considerations regarding divorce jurisdiction.

First, the desirable features of jurisdictional rules will be listed. There is general agreement about some of the objectives of a jurisdictional test but, nevertheless, opinions may differ as to their relative importance.

The study comprises an analysis of the common law, statutory
reforms, the current position and the alternatives available for the formulation of appropriate criteria for divorce jurisdiction.

Proposals for reform of the law are to be found at the end of Part 1 of this thesis.

B. OBJECTIVES OF THE RULES FOR JURISDICTION IN DIVORCE

It is submitted that the rules should:

1. Enable persons who have lived in a province for a reasonable time to petition the courts of that province for a divorce, irrespective of their legal domicile.

2. Be such that persons who do not live in the province are not prevented from petitioning the court, if they still have substantial ties with the province.

3. Be as clear and certain in their application as possible.

4. Not lead to anomalies and unnecessary inconvenience.

5. Not tend to cause limping marriages.

A limping marriage occurs when one law district views a marriage as valid and subsisting but another considers it invalid or terminated. The result is that the parties to the marriage are a married couple or single persons according to which country they are in -- an obviously undesirable state of affairs. Since recognition of a Canadian divorce in other law districts, particularly in common law countries, may depend on jurisdiction to grant it, the jurisdictional rules should not be so lax as to result in non recognition of Canadian divorces abroad.

This is not to say that the rules should be extremely strict.
Limping marriages have a variety of causes and it is not possible to eliminate all by means of a strict test for jurisdiction. The problem would be less likely to occur if all countries employed similar criteria for jurisdiction and similar standards of evidence. A more practicable solution is to formulate wider rules for recognition of divorces than jurisdiction.

6. The rules should not encourage forum shopping.

Forum shopping happens when a party, having no real connection with a law district, resorts to its jurisdiction merely because he can obtain a divorce more easily than in the law district with which he has a reasonable connection. Again, this is encouraged by very lax jurisdictional and substantive grounds for divorce. Forum shopping is also becoming more common in order to deprive a wife of the financial relief she may otherwise have obtained. Likewise, a wife may resort to a forum to obtain greater financial relief than she would have otherwise.

7. The rules, if possible, should prevent the petitioner from deliberately choosing a forum which is inconvenient to the respondent. This is really a form of forum shopping but deserves a separate mention. Choice of an inconvenient forum can effectively deprive the respondent of the opportunity to present vital witness evidence to the court.

C. HISTORICAL BACKGROUND

In England prior to the Divorce and Matrimonial Causes Act 1857 jurisdiction in matrimonial causes was vested in the ecclesiastical courts, which assumed jurisdiction to hear petitions for divorce a mensa et thoro
and nullity on the basis of residence within the area. Before 1857 an absolute divorce could be obtained only by means of a private Act of Parliament. The practice was to lodge a petition with the House of Lords. Parliament followed the ecclesiastical courts' practice; hence the ground for jurisdiction in divorce petitions before the 1857 Act was residence in England or Wales.

The law of Canada (with the exception of Quebec) was derived from English law. The date of adoption of English law in each province depends on when that province became a part of Canada. English law was adopted in the western provinces after the Divorce and Matrimonial Causes Act 1857 came into force. Thus, English statutory law of divorce was introduced into these provinces. However, in Ontario and Newfoundland, English law was introduced prior to 1857. These provinces, unlike Nova Scotia, New Brunswick and Prince Edward Island, did not have their own divorce legislation when they became part of Canada and the power to legislate on marriage and divorce was vested in the Federal Government by the British North America Act 1867. Thus, for many years, Ontario and Newfoundland had no divorce legislation until it was enacted by the Parliament of Canada. Nevertheless, between 1857 and the 1968 Divorce Act, the Canadian Courts were very much influenced by English case law regarding divorce jurisdiction.

In *Niboyet v Niboyet* a majority of the English Court of Appeal found that the residence test for jurisdiction in matrimonial causes had not been changed by the Divorce and Matrimonial Causes Act 1857. The court felt that no such principle as domicile existed in English matrimonial law, and that the law of domicile did not provide a better jurisdictional ground
than residence. It was pointed out that domicile only obviates limping marriages if other jurisdictions use the same test.

However, in 1895 the Privy Council in *Le Mesurier v Le Mesurier* established that "the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage". The *Niboyet* case was not followed because the court felt that, although residence may have been sufficient to grant the relief available to the ecclesiastical courts, it did not follow that such residence would also be sufficient for the much more significant step of dissolving the marriage. It is difficult to see why an absolute divorce decree is more significant than a nullity decree granted in respect of a voidable marriage. But after the *Le Mesurier* case it was accepted both in England and Canada that domicile of the parties was the sole basis of jurisdiction in divorce. In Canada it was necessary to prove domicile in a particular province.

Domicile has proved an appropriate test in many cases, especially since it covers expatriates, in other words, persons who are not currently living in the law district but who maintain substantial ties with it. Nevertheless, as an exclusive test at common law, the concept of domicile has presented many problems. It is replete with technicalities which tend sometimes to make its practical application absurd and highly inconvenient.

(1) **UNITY OF DOMICILE AND THE WIFE'S DEPENDENT DOMICILE**

At common law, the wife took her husband's domicile on marriage and her domicile thereafter was dependent on that of her husband. This doctrine of unity of domicile arose as an incident of the marriage because
"by marriage, husband and wife are one person in law".

Thus, if H, a Canadian from Alberta, were to go to Australia and acquire a domicile of choice in the State of New South Wales and W, his wife, were to remain in Alberta, her domicile would have been changed to New South Wales. At common law she would no longer have been able to petition the courts of Alberta.

The hardship caused to the wife by this rule emerged as a most pressing problem. Although attempts were made by the courts to modify the doctrine, the Privy Council in A-G for Alberta v Cook reaffirmed that nothing short of domicile of the husband in the law district would suffice for divorce jurisdiction.

(a) Partial Reform in Canada

In 1930 the Divorce Jurisdiction Act was passed. Under that act a married woman who had been deserted by and was living separate and apart from her husband, and who had been so living for two years, could present a petition in the province in which the husband was domiciled immediately prior to desertion.

Although this provision was of assistance to some deserted wives, it by no means solved all the problems arising from unity of domicile. It might have been extremely inconvenient to commence divorce proceedings in the province of desertion. Or it might have been impossible to determine the province of the husband's domicile at the time of desertion. In any event, the act did not provide for a situation where the parties separated amicably or where the husband did not form the intention to desert his wife until after he had left the province, by which time he might have been
(b) **Partial Reform in England**

The first reform was s. 13 of the Matrimonial Causes Act 1937 which was similar to the Divorce Jurisdiction Act in Canada, except that there was no requirement that the desertion period be at least two years and, in addition, s. 13 applied to cases where the husband had been deported. This again did not cover all situations of potential hardship to the wife.

Further reform was necessary and the Law Reform (Miscellaneous Provisions) Act 1949 provided that the court had jurisdiction notwithstanding the fact that the husband was not domiciled in England, provided that the wife was resident in England, and had been ordinarily resident there for three years immediately preceding the presentation of the petition.

This provision did not provide equality of jurisdiction over husband and wife. Therefore, it was possible for the law to operate inconsistently in favour of or against either spouse. For example, if H and W, natives of England, went to Australia, and the husband acquired a domicile of choice in New South Wales, but the wife returned to England after a short while, then the wife would not be able to petition the English courts for three years. On the other hand, if H and W went to England as immigrants and H did not acquire a domicile of choice there, W could petition for divorce after three years residence but H could not.
(2) OTHER PROBLEMS WITH THE "DOMICILE" TEST

(a) Tenacity of the Domicile of Origin

Everyone acquires a domicile of origin at birth, which is usually the domicile for the time being of the father, if the child is legitimate.

The domicile of origin continues until its holder has capacity to acquire a domicile of choice; but even then the domicile of origin continues unless it is clearly shown that there was a fixed and settled intention to acquire a new domicile. The onus of proof rests heavily on the party who asserts the change of domicile.

Thus domicile of origin is different from domicile of choice in "that its character is more enduring, its hold stronger and less easily shaken off". This could produce anomalies in divorce jurisdiction, because it would be harder for a petitioner to show that he had acquired his first domicile of choice in a particular law district than say his second or third or fourth domicile of choice.

However, it has been said that the standard of proof is the same, i.e., on a balance of probabilities, irrespective of whether the abandoned domicile is one of choice or origin. It is submitted that this cannot be correct. The adhesive quality of the domicile of origin is clearly shown in the case law, and this is indicative of a far higher standard of proof for a change from the domicile of origin to one of choice.

(b) Revival of the Domicile of Origin

If X abandons his domicile of choice without establishing a new domicile of choice then his domicile of origin revives. This is so even when X has not returned to his domicile of origin and never intends
to do so. Indeed it is possible that X has never lived in his domicile of origin and never intends to do so, but it will still revive. This can be highly inconvenient. For example, X has a domicile of origin in Germany and moves to England at four months of age. He lives there until the age of thirty and has a domicile of choice in England. At the age of thirty-one he moves to Ontario to live and is unsure whether he will remain there or move to New York State. Under the domicile test, at this point in time he would be unable to petition the English courts or the Ontario courts. The only forum immediately available to X would be Germany, a country with which he has had no connection since he was four months old. X may not even have recourse to the German courts if the basis of jurisdiction in Germany is residence or nationality or both.

(c) Intention to Acquire a Domicile of Choice

In order to acquire a domicile of choice a person must prove two things: first, residence in the law district in question, and second, intention to reside there permanently or indefinitely. A disproportionately heavy emphasis is laid on intention. "It must be a residence fixed not for a limited or particular purpose, but general and indefinite in its future contemplation."

A person cannot acquire a domicile of choice if he intends to leave upon a clearly anticipated and reasonably foreseeable contingency. So at common law, X will not acquire a domicile of choice, and therefore cannot bring a divorce petition, if he intends to leave the law district when his employment ends, even if he has lived there for twenty-five years.

However, there is authority which suggests that the burden of proof may
not be so heavy when the alleged change of domicile is from one province of Canada to another as opposed to a change from one country to another.
CHAPTER 2

THE CURRENT POSITION IN CANADA

A. THE WIFE'S DEPENDENT DOMICILE

Section 6 (1) of the Divorce Act 1968 provides that a married woman's domicile is to be determined as if she were unmarried for the purposes of that act:

6 (1) For all purposes of establishing the jurisdiction of a court to grant a decree of divorce under this act, the domicile of a married woman shall be determined as if she were unmarried and, if she is a minor, as if she had attained her majority.

Thus, the concept of unity of domicile has been effectively abolished for divorce purposes. A wife petitioner's domicile must now be determined without reference to the husband's domicile. The wife must prove that she is domiciled in Canada, either by origin, or in accordance with the ordinary rules for acquisition of a domicile of choice.

B. THE GROUNDS FOR JURISDICTION

The Special Joint Committee of the Senate and House on Divorce (1967) were aware of the rigidity of the common law concept of domicile and hence its unsuitability as the sole criterion for jurisdiction in a highly mobile society. The committee envisaged only two solutions: to abandon the concept of domicile altogether in favour of residence; or to abandon the concept of provincial domicile in favour of a national domicile. The two reasons given for not adopting the former solution were as follows:

1. To rely on residence alone for the institution of matrimonial proceedings might present complications in international law.
The committee itself gave no examples of such "complications" and it is difficult to imagine any potential problems. Possibly, if the only test for jurisdiction were mere residence in the province then this would be a valid reason, since mere physical presence in the province for one day could suffice — Canada would become a "divorce haven" for non-Canadians. This could also lead to forum shopping by Canadians and choice of a forum on the basis of its inconvenience to the respondent. But, if a reasonable period of residence were required this reason would not bear scrutiny. Canadian domiciliaries can already petition provincial courts on the basis of residence for a specified period pursuant to s. 5(1) of the Divorce Act. Where then would be the "complications"? Did the committee envisage a flood of divorce petitions from immigrants to Canada who have not acquired a Canadian domicile? This is hardly likely and, consistent with the objectives outlined in the first chapter of the thesis, it is submitted that immigrants should not be denied access to Canadian divorce courts, provided that they have lived in Canada for a reasonable period of time.

2. To rely on residence alone for the institution of matrimonial proceedings might lead to difficulties in the recognition abroad of Canadian divorces.

This again would be true if no specific period of ordinary residence were required.

As mentioned previously, it is not possible to secure recognition for all divorces. In 1967 most commonwealth countries recognized divorces on the basis of domicile and a residence provision might have led to such recognition problems at that time. This is not the case today — English
statutory rules for recognition are more relaxed, the same is true in Australia and other countries may adopt a recognition test based on a "real and substantial connection" with the jurisdiction granting the divorce.

The concept of domicile is also alien to many civil law countries which base recognition on nationality or residence or both.

The current grounds for jurisdiction in divorce are set out in s. 5(1) of the Divorce Act:

5(1) The court for any province has jurisdiction to entertain a petition for divorce and to grant relief in respect thereof if,

(a) the petition is presented by a person domiciled in Canada; and

(b) either the petitioner or the respondent has been ordinarily resident in that province for a period of at least one year immediately preceding the presentation of the petition and has actually resided in that province for at least ten months of that period.

Thus, the Divorce Act retains domicile as an essential prerequisite to jurisdiction but the concept of provincial domicile has been replaced by a national or Canadian domicile.

It should be noted that s. 5(1) contains two concurrent jurisdictional requirements. The petitioner must not only be domiciled in Canada but also must satisfy the provisions of s. 5(1)(b) relating to residence. Presumably Parliament when enacting s. 5(1)(a) sought to introduce a less rigid connecting factor and, by way of s. 5(1)(b), sought to ensure a reasonable connection between province and party to the action. The Special Committee on Divorce felt that a one year residence requirement would prevent forum shopping
within Canada or choice of a province on the basis of its inconvenience to
the respondent. Clearly, these are very legitimate concerns in such a
vast country and it is submitted that some preventive measures are
indeed necessary if there is to be a federal domicile.

(1) **AN ANALYSIS OF SECTION 5(1)(a)**

The court has jurisdiction only if the petition is presented by a
domiciled in Canada. A petition is "presented" when filed. The
petitioner must be domiciled in Canada when the petition is filed, and
cannot invoke jurisdiction on the basis of the respondent's domicile in
Canada. There seems to be no justification for this -- the domicile of
the petitioner or the respondent ought to suffice. Allowing a petition
on the basis of the respondent's domicile militates against forum shopping
or choice of an inconvenient forum by the petitioner. Indeed, these
undesirable consequences are more likely if jurisdiction is based solely
on the petitioner's domicile.

(a) "Domiciled in Canada"

The concept of Canadian domicile has been used before in the Immigration
Act, but the concept as defined in that act is restricted to matters of
immigration law.

The Special Committee on Divorce in its recommendations proposed a
definition of "Canadian domicile". It suggested that a person should
have a Canadian domicile if he or she, in accordance with existing rules of
private international law, was domiciled in any province of Canada.

One may speculate as to why this recommendation was not implemented.
It is possible that Parliament thought the definition was redundant -- that
in the absence of express provision the common law rules would apply, and these of course refer to provincial domicile. In this situation the jurisdictional rules would be relaxed only for people already domiciled in a particular province; for example, X, domiciled in Ontario, could petition the courts of British Columbia if he satisfied the residence requirements.

On the other hand, it is possible that Parliament did not think it should be necessary to prove domicile in the province in order to establish domicile in Canada; in other words, that it should only be necessary to prove domicile in the national unit of Canada. This is the interpretation adopted by the courts.

The cases indicate that the common law rules apply to determine domicile in Canada, but that the principles developed in relation to provincial domicile are now to be applied to the national unit of Canada.

The overall effect of s. 5(1)(a) is to relax the test for jurisdiction, since it is easier in some instances to prove domicile in Canada as a whole than domicile in a province. For instance, in Geldart v Geldart a wife came to Canada, intending to follow her husband in his employment wherever it took him in Canada. She was found to have a Canadian domicile of choice, even though she had no specific intention to remain permanently in Nova Scotia, the province in which she presented the petition.

However, with the exception of the wife's dependent domicile, the drawbacks of the common law concept of domicile remain. A person wishing to petition the courts must prove domicile, albeit Canadian, and so is still subject to the doctrine of revival and tenacity of the domicile of origin. The onus of proof continues to rest on the person alleging a change of domicile.
It is highly inconvenient that intention to reside permanently or indefinitely remains a prerequisite for divorce jurisdiction. People who have been resident in Canada for a reasonable amount of time may be denied the right to petition the Canadian courts for a divorce. In Armstrong v Armstrong, a professor with four years residence in Ontario was unable to petition for divorce because he thought he would be returning to Australia the following year. Also, if Australia had a test for jurisdiction similar to Canada, i.e. domicile and residence immediately prior to presentation of the petition, the professor in the Armstrong case would have been without a forum in which to petition until he satisfied the Australian residence test. Obviously, this does not recommend the Canadian test.

(b) Capacity to acquire a Canadian domicile

A further problem arises in this context with regard to capacity to acquire a Canadian domicile. At common law a minor, with the exception of female married minors, does not have the capacity to acquire a domicile of choice until he reaches majority (at twenty-one years of age). But the age of majority now varies from province to province as a result of provincial legislation. Does this mean that capacity to acquire a Canadian domicile for divorce purposes will depend on the provincial legislation? Or will the common law age of majority prevail in matters of federal jurisdiction? Mendes Da Costa is in favour of the latter approach since it corresponds with the intention of the Divorce Act, namely, uniformity of Canadian divorce laws. This seems reasonable, but it appears that the issue has yet to be determined judicially and this gives rise to some uncertainty.
(2) **AN ANALYSIS OF SECTION 5(1)(b)**

The purpose of this exposition is to review the courts' interpretation and application of the residence requirements for jurisdiction under s. 5(1)(b) of the Divorce Act. The concurrent requirement of domicile in Canada under s. 5(1)(a) has already been analyzed. In the cases to follow, the central theme has been the interpretation of s. 5(1)(b); questions as to the petitioner's domicile were either not in issue or not raised.

The residence requirements are:

5(1) The court for any province has jurisdiction to entertain a petition for divorce and to grant relief in respect thereof if,

(b) either the petitioner or the respondent has been ordinarily resident in that province for a period of at least one year immediately preceding the presentation of the petition and has actually resided in that province for at least ten months of that period.

First, some preliminary points should be outlined. Unlike s. 5(1)(a), the petitioner or the respondent may satisfy the residence provisions of s. 5(1)(b). If the parties are unable to comply with s. 5(1) no court in Canada has jurisdiction to hear the petition.

Section 5(1)(b) involves two concepts, namely 'ordinary' and 'actual' residence, and these words are not defined in the act. It seems that a person may be 'ordinarily' resident in a province without 'actually' residing there for the whole period, i.e. that these words are not co-terminous. In respect of both actual and ordinary residence, it is necessary to bear in mind the quality of residence required and the calculation of the prescribed period of time during which such residence must exist.

An attempt will be made to prove that s. 5(1)(b) is badly drafted and
unnecessarily complex; that the courts have experienced difficulty in its interpretation; and that the subsection is inconvenient in its general application. In some instances the residence provisions of s. 5(1)(b), combined with the domicile test of s. 5(1)(a), produce a far harsher result than the original test of domicile in a province of Canada. For this reason, and in order to comply with the objectives outlined in the beginning of this part, it is submitted that more relaxed jurisdictional rules are warranted.

In view of the inconsistency of the case law, the concept of 'ordinary residence' will be analyzed in depth. This will be followed by an examination of the 'actual residence' requirement and, finally, a general conclusion of the current Canadian tests.

(a) Ordinary Residence

(i) Nature of "Ordinary Residence"

There is a marked division in the courts' interpretation of 'ordinary residence'. In some cases, the courts have been prepared to construe these words fairly liberally. In others, a very narrow interpretation has prevailed, whereby 'ordinary residence' has been likened to 'physical presence'.

(ii) Liberal Interpretation

In *Hardy v. Hardy* the relevant facts were that the petitioner, a Captain in the Canadian Army, was born in Ontario, lived continuously in Ontario until he joined the army in 1948, and spent his periods of leave at his parents' house in Sarnia, Ontario. His army records were kept in Ontario and apparently he intended to return to Ontario on leaving the army. During his army service the petitioner had been posted abroad and in Canada.

The test used by Houlden J. in finding the petitioner ordinarily
resident in Ontario, was derived from an English case. He asked the question: "Where did this petitioner, regularly, normally or customarily live in the year preceding the filing of the petition?" This qualitative test has been approved in some of the subsequent cases. It is submitted that this is the correct interpretation and it should be noted that such a test does not preclude, theoretically at any rate, the possibility of multiple ordinary residence. If this were possible, then a Canadian domiciliary who ordinarily lives in a province of Canada may have access to the divorce court of that province, despite his ordinary residence elsewhere during some part of the year immediately preceding the presentation of the petition. An example of this situation would be a wealthy or retired person who regularly spends the summertime at his residence in British Columbia and the wintertime at his residence in Hawaii.

In *Marsellus v Marsellus* Aikins J. held that a person ordinarily resident in one province may leave that province, and actually reside elsewhere for "special purposes", and yet continue to be ordinarily resident in such province. The court applied the "real home" test and found that the petitioner, a member of the Canadian Army, became ordinarily resident in British Columbia in 1960. His ordinary residence was not lost or interrupted by the fact that he was posted to Germany for over three years between 1966 and 1969.

The possibility that the petitioner may have had two ordinary residences was not considered in the *Marsellus* case. It would seem to be straining the meaning of 'ordinary' to say that during the time when the petitioner was in Germany he was not also ordinarily resident there, especially if his posting at that stage was for an unlimited period. This does not mean to say that the
petitioner in the circumstances of the Marsellus case should not be found ordinarily resident in British Columbia. The matrimonial home was situated in British Columbia and the petitioner returned to this province when he left Germany.

The concept of absence for "special purposes" employed by Aikins J., which has been said to be "useful" appears to be a superfluous legal refinement if ordinary residence is to be given a liberal interpretation.

Rand J., in a Supreme Court of Canada decision, said it was impossible to give the term "residing" a "precise and inclusive definition". He went on to say:

"The expression 'ordinary residence' carries a restricted signification and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is therefore relevant to a question of its application."

The facts reported in Lotoski v Lotoski are inadequate for constructive criticism. The divorce petition was presented on October 3rd, 1968, and the evidence was that the petitioner separated from her husband in 1956, and in 1960 commenced living in British Columbia with another man, as his wife, and remained in that situation until 1963. The man was transferred to Montreal in the course of his employment. He and the petitioner lived together in Montreal between 1963 and February 1968, when they both returned to British Columbia, where they were actually resident until presentation of the petition. Macdonald J., of the Supreme Court of British Columbia, gave no reasons for his decision that the petitioner was not ordinarily resident in British Columbia for at least one year immediately preceding the filing of
the petition.

The petitioner's residence prior to 1960 was not disclosed. Let us assume for a moment that she had been resident in British Columbia for twenty years prior to 1960. Should the fact that her "husband" was transferred to Montreal operate to terminate her ordinary residence in British Columbia? It is thought not, and to hold otherwise would be contrary to the decisions in the Hardy and Marsellus cases.

If, however, the petitioner did not live in British Columbia at all until 1960, prima facie, it is reasonable that three years residence in British Columbia between 1960 and 1963 should not be sufficient for jurisdiction to be assumed in 1968. But if for example, the petitioner maintained a residence in British Columbia during the years she was absent, the facts would resemble those in the Marsellus case, in which the petitioner was found to be ordinarily resident in British Columbia from 1960 onwards.

The decision in Zoldester v Zoldester is consistent with the Marsellus and Hardy cases and with the proposition that "ordinary residence" is different from residence simpliciter or physical presence. It was held that the wife petitioner remained ordinarily resident in British Columbia despite the fact that her husband, a foreign government official, was posted to India and she lived there with him for one month during the year immediately preceding the presentation of the petition.

However, Hutcheon Co. Ct. J. appears to make two questionable assumptions. Firstly, he said, "I am satisfied, however, that in this particular case anyone in the circumstances of this petitioner, if asked during February, 1973 (the month during which she was in India) where she was ordinarily resident, would have given British Columbia as the answer." The petitioner
was a newlywed who honeymooned in Europe and arrived in Bombay, India to start her married life. During February, the petitioner and respondent were living in hotels, waiting for their apartment in Bombay to become ready. It is equally likely that the petitioner would have given India as the answer, or no answer at all.

Secondly, the court failed to consider whether or not the petitioner's domicile in Canada was affected by the move to India.

Doucet v Doucet also gives a liberal interpretation to the quality of ordinary residence required. A United Nations employee, who was posted abroad for many years, was held still ordinarily resident in Ontario. Factors taken into account were that he spent holidays in Ottawa, had a room in a friend's house which was kept for his use only, and intended, on leaving the United Nations, to return to Ottawa.

In Zawatsky v Zawatsky the parties were born and lived their whole life in Saskatchewan. In an attempt to save their marriage, the parties spent slightly less than four months in British Columbia during the year preceding the presentation of a divorce petition in Saskatchewan. Macleod J. ignored s. 5(1)(b) and simply stated that where parties were domiciled in Saskatchewan, and ordinarily resident there, a "sojourn" of that length of time in another province on a trial basis was not sufficient to deprive the court of jurisdiction.

It is submitted that the court was clearly wrong in failing to consider the existing statutory provisions. Nevertheless, had the court given full consideration to the "ordinary" and "actual" residence requirements of s. 5(1)(b), the result may have been highly inconvenient. Saskatchewan domiciliaries, who had spent their lifetime in that province, may have been
denied immediate access to the Saskatchewan divorce courts as a result of four months' absence from the province. Had this been the case, s. 5(1) would have represented a more stringent test than that of provincial domicile.

(iii) Narrow Interpretation

The divergence in the courts' interpretation of "ordinary residence" for the purposes of s. 5(1)(b) seems to stem from the decisions of McLellan Co. Ct. J. of the Supreme Court of Nova Scotia. For instance, the decision in Cullen v Cullen is inconsistent with the "real home" test used in the Hardy case. In Cullen, both petitioner and respondent were born and raised in Nova Scotia, and the petitioner had been resident in Nova Scotia all her life. The husband respondent left Nova Scotia to look for work in Ontario and the wife petitioner subsequently decided not to join him, but to join her lover in Vancouver. She sold her furniture, paid off debts, and an apartment was secured in Vancouver. The petitioner boarded the plane for Vancouver three days before the petition for divorce was filed. McLellan Co. Ct. J. found that the petitioner ceased to be ordinarily resident in Nova Scotia when she boarded the plane. But, if asked the question, "Where did the petitioner regularly, customarily or ordinarily live during the year preceding the presentation of the petition?", surely the answer in the Cullen case should have been Nova Scotia.

McLellan Co. Ct. J., however, followed Macrae v Macrae in which Somervell L.J. said:

"Ordinary residence is a thing which can be changed in a day. A man is ordinarily resident in one place up till a particular day. He then cuts the connection he has with that place - in this case he left his wife; in another case he might have disposed of his house - and makes arrangements to have his home somewhere else."
Where there are indications that the place to which he moves is the place which he intends to make his home for, at any rate, an indefinite period, as from that date he is ordinarily resident at that place."

The facts in the latter case are patently different from those in the Cullen case. In the Macrae case, the court found the husband to be ordinarily resident in his parents' home in Scotland at the material time, which was the time when the summons was served - some time after the husband had left England and moved to Scotland. The court took into account facts occurring after the move to Scotland in determining that he was no longer ordinarily resident in England. These included a letter received by the wife around the time the summons was served, and a written statement by the husband stating that he had taken up employment in Inverness and intended settling there. In the letter, the husband said:

"I am writing to let you know that I have decided to have my home in Inverness. I have got a home....I will add a scullery and one or two things onto it..... also I shall be running the garden....and I shall have a place I can call my own...."

On the other hand, in the Cullen case, the wife rather whimsically, it would appear, left her home province in the face of mounting debts to be near her lover. It is submitted that although ordinary residence "can" be changed in a day, this does not mean to say that ordinary residence must, of necessity, always change overnight.

A further observation is that in the Cullen case, had the jurisdictional requirement been domicile within a province, the wife petitioner most probably would have satisfied the test. It is conceivable that the wife acquired a domicile of choice in British Columbia when she arrived there, but it would seem more probable that she retained her domicile in Nova Scotia, in view of
the fact that she was born, raised and lived almost all her life in Nova Scotia.

In 1970, McLellan Co. Ct. J., of the Supreme Court of Nova Scotia, decided his second reported case on s. 5(1)(b), namely Nowlan v Nowlan.

The facts were that the petitioner was born and raised in Nova Scotia and lived there until her marriage in 1959. The respondent was a member of the Canadian armed forces and he and the petitioner subsequently spent two and a half years in Germany. On their return to Canada they separated and the petitioner spent six months in Nova Scotia at the home of her grandmother. In 1963 she returned to her husband who was stationed in New Brunswick. In 1966 the petitioner again left the respondent and lived for three or four months in Nova Scotia with her mother and remained in Nova Scotia for 16 months. In October 1968 the wife resumed cohabitation with her husband in New Brunswick on the understanding that if things did not work out there would be a divorce. At Easter, 1969, the petitioner returned to Nova Scotia for ten days to make arrangements to live with her mother after the end of the children's school year in New Brunswick. She then left the respondent in mid-July 1969, returned to Nova Scotia, and filed a divorce petition less than one year later, on the 11th of June, 1970.

It was held that the petitioner was not ordinarily resident in Nova Scotia for the prescribed period under s. 5(1)(b). McLellan Co. Ct. J., made no reference to the Hardy or Marsellus cases nor to the English case, Stransky v Stransky. The Judge implied clearly that he thought "ordinary residence" meant little more than residence simpliciter, but that it could be contrasted with extraordinary residence. Two English cases were relied upon for this proposition. In one of those cases it was held
that a wife petitioner, while physically present in Canada, was also 76
ordinarily resident there.

If this view is taken for the purposes of s. 5(1)(b), then "ordinary
residence" means "actual residence" and the section is absurd.

There is far greater support for the opposite conclusion, that
ordinary residence and residence or actual residence are not co-terminous. 77
It is submitted that the reasoning in Stransky v Stransky 79
is correct, where Karminski J. said the use of the words 'resident' and 'ordinarily
resident' in the relevant English statute was neither meaningless nor
accidental. In the Stransky case, a wife, who was physically absent for
fifteen out of thirty-six months, owing to her husband's job, was still
ordinarily resident in England during the whole period. 81

The court in Nowlan v Nowlan rejected the argument that intention
to return to Nova Scotia from the time of the petitioner's ten day visit at
Easter made her ordinarily resident in Nova Scotia from that date. It was
said that intention is not the "main criterion" in determining residence.
Of course, the emphasis on intention is greater in cases concerning domicile
than those involving ordinary residence. Nevertheless, if all the circum­
stances of the case are to be considered, surely intention must be relevant.

McLellan Co. Ct. J. in the Nowlan case did not appear to consider all
the circumstances, but merely attached the label "extraordinarily resident"
to the petitioner's stay in Nova Scotia at Easter, 1969. Between July 1967
and 11th June 1970, the petitioner had, in fact, spent most of her time in
Nova Scotia. Had the court taken this fact into account, the petitioner's
intention to return to Nova Scotia as of Easter 1969 may have been an
additional factor in determining ordinary residence, but surely not the
"main criterion".

The *Nowlan* case is also an illustration of unwarranted inconvenience which could be avoided if the domicile test alone were sufficient. The facts in *Girardin v Girardin* were that the petitioner, who was born in Ontario, moved to Saskatchewan in 1954 and lived there continuously until 1969 when her husband was transferred, in the course of employment, to Nova Scotia. The petitioner returned to Saskatchewan for visits during the time she lived in Nova Scotia, and returned to live in Saskatchewan in 1972, just over ten months prior to presentation of the petition. The court referred to the *Macrae*, *Cullen*, *Nowlan*, and *Hopkins* cases, all of which emphasize the requirement of physical presence for ordinary residence. It was held that the "home base" of the petitioner between 1969 and 1972 was Nova Scotia and therefore the petitioner was ordinarily resident there for that period. The possibility of two ordinary residences was not considered. Thus, it was held that the petitioner was ordinarily resident in Saskatchewan for only ten months or so immediately preceding the presentation of the petition and therefore did not satisfy the requirements of s. 5(1)(b).

The result of the "McLellan interpretation" in this case is again most inconvenient. A person with sixteen years residence in Saskatchewan was refused immediate access to the divorce courts, whereas it is quite likely that the petitioner would have satisfied the common law test of provincial domicile.

*Robichaud v Robichaud* can be contrasted with the *Zawatsky* case which was considered under the heading of liberal interpretation. The petitioner in the former case had lived continuously in New Brunswick until 1972, when she went to Ontario in an attempt to reconcile her marriage. She returned
to New Brunswick in April, 1973, a date less than one year prior to presentation of the petition. Stevenson J. followed Nowlan v Nowlan and found that the petitioner, while in Ontario, was ordinarily resident there. But he also said there was nothing in the petitioner's testimony to suggest that she had two residences, before finding that she had not been ordinarily resident in New Brunswick for at least one year immediately preceding the presentation of the petition.

MacPherson v MacPherson is a fairly recent decision of the Ontario Court of Appeal. The petitioner, a native of Ontario, spent three months in Nova Scotia in 1969 and lived there for approximately five months in the year immediately preceding the filing of the petition. The rest of her time was spent in Ontario. The petitioner was found not to have been ordinarily resident in Ontario for at least one year immediately preceding the filing of the petition and the appeal was allowed. Evans, J.A. quoted extensively from previous authorities and said, "In my opinion, the arrival of a person in a new locality with the intention of making a home in that locality for an indefinite period makes that person ordinarily resident in that community....I do not believe that intention alone can determine the issue of ordinary residence". The court then refused to take into account the petitioner's alleged intention to return to Ontario during the time she spent in Nova Scotia. The implication is that more weight is to be given to an intention to remain in a given province than to an intention to return to another. This seems somewhat illogical and unjustified. Furthermore, it is inconsistent with the reasoning in the Hardy and Doucet cases. In the latter case especially, intention to return to Ottawa was considered relevant to establish that the petitioner's ordinary residence in Ontario had not been
lost or interrupted.

Evans J.A. spoke of "intimate community ties" with Nova Scotia, but does not state what these were or take into account the fact that the petitioner was only there for about five months. Also, given the fact that the petitioner was ordinarily resident in Nova Scotia, the court did not consider whether or not she could be said to have two ordinary residences.

The petitioner in the MacPherson case most probably would have satisfied the common law domicile test. This is yet another example of a harsh result produced by the concurrent requirements of s. 5(1).

Perhaps the striking divergence in interpretation of "ordinary residence" outlined above is in part the result of lack of definition of whether ordinary residence is to be determined by reference to:

(a) generally all the circumstances of the case or
(b) generally the 12 months preceding the filing of the petition or
(c) the day on which the petition is filed and thereafter the 12 months preceding the filing of the petition.

This comment is, of course, equally applicable when considering the period of ordinary residence.

(iv) The Period of Ordinary Residence

The period of ordinary residence required under s. 5(1)(b) is "at least one year immediately preceding the presentation of the petition". However, when considering the period of ordinary residence, the court is not limited to the year immediately preceding the petition. Thus, in Wood v. Wood the petitioner was found to have been ordinarily resident in Manitoba for nineteen years. This in turn has an effect on the calculation of the period of "actual residence", which is discussed below.

Counsel in the Robichaud case indicated the difficulty involved with
the requirement for ordinary residence for a specific period. If a resident of province A goes to province B for less than one year and returns to province A, then neither province A nor province B has jurisdiction to hear the petition until more than one year after return to province A.

Clearly, in cases where the petitioner is domiciled in the province in question, this residence requirement is unreasonable.

Calculation of the period of ordinary residence varies according to the courts' interpretation of the nature of ordinary residence. A more flexible attitude is taken towards the period of residence in the cases which interpret ordinary residence liberally. In Zoldester v Zoldester Hutcheon Co. Ct. J. said, "It is impossible to fix the precise point in time when a person who, by the nature of his work, is required to move from one country to another, or from one province to another, ceases to be ordinarily resident in the first country or province". And it seems that the word "person" in the quotation above includes the wife of such person. In the Zoldester case the husband was posted abroad. But the wife petitioner, who had accompanied him for a short time, was held not to have lost her ordinary residence in British Columbia.

Therefore, given a wide interpretation, ordinary residence is less likely to be lost or interrupted by absences from the province, even if they are lengthy absences, and similarly the period of ordinary residence is less likely to be reduced or brought into question.

On the other hand, under the "McLellan interpretation" ordinary residence is closely linked to physical presence. Thus, the period of ordinary residence will be affected by physical absence from the province, unless the extra provincial residence may be termed "extra-ordinary".
In *Graves v Graves*, for instance, the petitioner's ordinary residence was questioned, even though she had been absent from the province for only one week during the year preceding the petition. Clearly, the "actual residence" requirement of s. 5(1)(b) is redundant if the "McLellan interpretation" is followed.

(v) **Summary**

(a) There is a clear division in the cases between those which adopt a liberal interpretation of ordinary residence, and those which link ordinary residence very closely to residence and thus to physical presence.

(b) Likewise, there is also division in the calculation of the period of ordinary residence. Some cases take into account all the circumstances of the case and others look specifically to physical presence and events taking place in the year preceding the presentation of the petition. Given a narrow interpretation "ordinary residence" is more likely to be terminated by absence from the province.

(c) Intention would appear not to be a major factor in most cases. However, it is submitted that objective evidence of intention to return is to be considered in determining whether ordinary residence has been lost or interrupted. For instance, maintaining a residence in the province while one is absent would seem to ensure that ordinary residence is not lost.

(d) The possibility of two ordinary residences has been mentioned in only one case. It has been suggested that it may be impossible to have more than one ordinary residence where such residence is a basis for jurisdiction. But this suggestion was based on *Hopkins v Hopkins*, a case which practically equates ordinary residence with physical residence. Logically, there is no reason why a person who lives part of the time in
one place and part in another cannot be ordinarily resident in both.

(e) Possibly, ordinary residence will not be lost by absence from the province if a government employee is transferred in the course of employment, as opposed to a private enterprise employee or his wife. This view is apparently adopted in *Masse v Sykora*, on the illogical basis that residence outside a particular province for the purpose of public service or study is "extraordinary", while for the purpose of private employment it is not.

(f) The combined domicile and residence test can be harder to satisfy than the common law test, and can result in unwarranted inconvenience for the parties.

(g) Possibly, ordinary residence is more easily lost or interrupted if an employee (or his wife) is transferred to another province of Canada than if an employee (or his wife) is posted abroad.

(b) **Actual Residence**

Section 5 (1)(b) not only requires the petitioner to be ordinarily resident in the forum province for at least one year immediately preceding the presentation of the petition, but also to be actually resident in the province for at least ten months of "that period".

There has been general agreement that "actual residence" requires actual physical presence. It seems that the ten months "actual residence" in a province need not be consecutive; but, cumulatively, there must be ten months physical presence.

Difficulty has arisen in the interpretation of the words ten months of "that period" at the end of s. 5(1)(b). "That period" obviously relates
to the period of ordinary residence. But there are two possibilities: first, that the words refer to the minimum period of "one year immediately preceding the presentation of the petition"; or second, that they refer to the whole period of ordinary residence. It is submitted that this ambiguity alone is sufficient grounds for redrafting s. 5(1)(b).

In *Wood v Wood* it was held that the words meant that there had to be ten months physical presence in the forum province during the whole period of ordinary residence. This interpretation has been approved and applied in subsequent cases. In British Columbia, at least, it now seems settled that this is the interpretation which will be applied.

In *Hardy v Hardy* "that period" was held to mean ten months physical presence in the forum province during the year immediately preceding the presentation of the petition. This interpretation has also been implicitly approved and applied.

To follow the *Wood* interpretation makes the requirement of actual residence meaningless since it is difficult to imagine a person being ordinarily resident in a province for twenty years, or even five years, who has not accumulated a total of ten months actual residence. For this reason, it is submitted that the *Hardy* interpretation must be correct.

Aikins J., in the *Marsellus* case, followed the *Wood* interpretation, primarily on the grounds of convenience, but referred to the *Hardy* interpretation as an "equally viable alternative". Matheson Co. Ct. J. followed the *Wood* interpretation "because of the impracticable, unjust and indeed, monstrous result" of following the *Hardy* case; but he did say of the latter, "Indeed, it is entirely probable that the learned Judge has surmised what was in the minds of the legislative draftsmen". In
MacPherson v MacPherson, while the majority was in favour of the Wood interpretation, Evans, J.A. dissented strongly on this point.

However, whichever interpretation is preferred, it is submitted that the actual residence requirement should be removed. Physical presence is already a factor in determining ordinary residence, which requirement provides sufficient connection between province and party. The following illustrations may be helpful (assuming that the wife cannot satisfy the provisions of s. 5(1)(b).

A husband domiciled and resident in X province for twenty years is actually away on business for six months during the year immediately preceding the presentation of the petition. Under the Hardy interpretation, the court does not have jurisdiction to hear the petition for divorce.

A husband ordinarily resident in X province for five years, changes his ordinary residence to Y province in 1979, but for business reasons is not physically present in Y province for more than three months of any given year. Under the Hardy interpretation, the husband would never, or not until retirement, be able to obtain a divorce in Y province. Such a result is unjust as well as inconvenient. Under the Wood interpretation, he would have to wait until approximately 1983 before he could present his divorce petition.

(3) CONCLUSION

Retention of domicile as the sole test for jurisdiction has all the drawbacks of the common law test, with the exception of the wife's dependent domicile, which has been effectively abrogated for divorce purposes. In addition, there is some uncertainty regarding capacity to acquire a Canadian
domicile. The combined test of domicile and residence can produce a harsher result than the common law ground of provincial domicile. Overall, this results in a highly inconvenient jurisdictional test and, preferably the domicile test should not have residence for a specified period as a concurrent requirement.

The residence test is badly drafted and unnecessarily complex. The courts have experienced much difficulty in the application of s. 5(1)(b) or perhaps, more aptly, in seeking to avoid the application of its provisions, and this has led to inconsistency. In view of the marked divergence in the interpretation of ordinary residence, and consequently in the calculation of the period of ordinary residence, this concept has proved unsatisfactory in Canada for divorce purposes.

The additional requirement of actual residence appears unjustified and unreasonable. Indeed, it is redundant if ordinary residence is interpreted narrowly or if the period of ordinary residence is lengthy.

Thus, it is submitted that s. 5(1) as a whole should be repealed and replaced with a more appropriate provision. Alternative provisions will be considered in the next chapter.

(4) **STAY AND TRANSFER PROVISIONS**

Section 5(2) of the Divorce Act is currently the only relevant statutory provision in this regard. It deals only with the situation where petitions are pending in two courts at the same time:

5.(2) Where petitions for divorce are pending between a husband and wife before each of two courts that would otherwise have jurisdiction under this Act respectively to entertain them and to grant relief in respect thereof, (a) if the petitions were presented on different days and the petition that was presented first is not discontinued
within thirty days after the day it was presented, the court to which a petition was first presented has exclusive jurisdiction to grant relief between the parties and the other petition shall be deemed to be discontinued; and

(b) if the petitions were presented on the same day and neither of them is discontinued within thirty days after that day, the Federal Court - Trial Division has exclusive jurisdiction to grant relief between the parties and the petition or petitions pending before the other court or courts shall be removed, by direction of the Federal Court - Trial Division, into that court for adjudication.

This section is clearly designed to cover the situation where the spouses are resident in different provinces and each brings a petition for divorce in his or her respective province. The solution provided by s. 5(2) is that if the first presented petition is not discontinued within thirty days then the court in which the first petition was presented has exclusive jurisdiction. If the petitions were presented on the same day and neither is discontinued within thirty days, then the Federal Court - Trial Division has exclusive jurisdiction.

Obviously, it does not necessarily follow that the first petition to be presented ought to be the one which is continued. It may well be, in some instances, if the balance of fairness and convenience to the parties were taken into account, that the second petition ought to be allowed to continue.

The case of Taylor v Taylor provides an interesting illustration of the operation of s. 5(2)(a). H was granted custody of the children of the marriage in Ontario in 1975 and then moved with them to British Columbia. W issued a petition for divorce in Ontario in 1978 and H obtained an order staying the Ontario petition so that he might start divorce proceedings in British Columbia, which he then did. W filed an answer and counter petition in British Columbia raising the defence of lack of jurisdiction on the part of
the Supreme Court of British Columbia.

On an application by H to strike out the answer and counter petition it was held that the British Columbia court did not have jurisdiction to hear the divorce petition since the Ontario petition had been issued first and had not been discontinued within 30 days.

Surely, the Ontario court, when it granted a stay of the Ontario petition, was of the opinion that the appropriate forum for the hearing was British Columbia? Yet, the British Columbia court, as a result of s. 5(2)(a), was forced to deem the petition presented to it to be discontinued without consideration of the circumstances of the case.

In addition to arbitrary operation, s. 5(2) carries the potential for producing anomalous and inconsistent decisions. Two further examples illustrate this point.

First, from the wording of the section, it only applies where both petitions are filed in different provinces in Canada. Therefore, had the Ontario petition been filed in New York State instead of Ontario, s. 5 would not have been applicable and the Supreme Court of British Columbia would presumably have had to refer to common law principles, which are discussed below. This might well have produced a different result.

Second, s. 5(2)(a) clearly states that, if a petition is filed in one province and not discontinued within thirty days thereafter, all other later petitions are deemed to be discontinued if the first petition is still pending. However, there are several situations in which this literal interpretation could produce an unfair, if not absurd, result. For example, in 133 Barlow v Barlow the petitioner had filed for divorce in Alberta in June, 1970. That action was not pursued to trial and the petitioner filed
for divorce again in British Columbia in 1972 before the Alberta action had been discontinued. The British Columbia action came to trial after the Alberta action had been discontinued.

At trial, Anderson J. ordered the petition to be reissued and service to be dispensed with, by consent of all the parties, presumably in order to avoid the application of s. 5(2)(a) which would have deemed the British Columbia petition to be discontinued. He then stated in his reasons for judgment that it was not necessary to reissue the petition, since s. 5(2)(a) should be restricted to cases where one spouse filed a petition in one province and the other spouse filed a petition in another province. The basis given for this conclusion was that s. 5(2)(a) should not be interpreted so as to produce an absurd result.

It is submitted that an equally absurd result is possible whether or not it is the same spouse who files the second petition. If the spouse who commenced the first petition has not pursued it, there is no logical reason for denying the other spouse the right to proceed at a later date in a different province. Whether or not the other spouse would be precluded from proceeding in another province in these circumstances is not clear from the Barlow case.

Furthermore, it is submitted that there is no rational basis for a distinction which allows the spouse who files for divorce first in one province to proceed in another province, yet at the same time denies that right to the other spouse. For example, H and W lived together in Ontario until 1975 when they separated. H filed a divorce petition in 1976 in Ontario. Nothing further was done until 1980, when W, now living in British Columbia, files for divorce here. H also decides to file for
divorce in Nova Scotia where he is now living, once the British Columbia petition has been served on him. According to Barlow, provided that H discontinues the Ontario petition before the trial of the British Columbia petition, it would appear that H may proceed in British Columbia, while W's petition in Ontario is deemed discontinued. W would presumably be unable to proceed in Ontario unless she files a counter petition in H's action before it is discontinued. Of course, if Barlow were not followed in Ontario a strict application of s. 5(2)(a) would bestow exclusive jurisdiction upon the Ontario court.

On the basis of this analysis, it is submitted that s. 5(2)(a) is too rigid in its application and should be replaced by a more flexible discretionary provision.

Turning to s. 5(2)(b), there is no statutory power, except in the limited circumstances of this section, to transfer a divorce petition to another court in Canada. It is not hard to imagine situations in which a discretionary transfer provision also could be most useful to the court in order to prevent a petitioner from taking advantage of an inconvenient forum. Had there been such a power, the Ontario Court in the Taylor case could have simply transferred the Ontario petition to British Columbia, instead of staying it in order that H might issue a second petition in British Columbia. The potential use of a transfer provision will be discussed in more detail in the following chapter.

The Common Law

Where proceedings are pending abroad, or when there is an international element to a case, it is clear from the wording of the section that s. 5(2) does not apply. Therefore, reference must be made presumably to common law
grounds for staying actions and, in appropriate cases, the Rules of Court of the province in question.

Canadian common law on this subject is somewhat confused for two reasons. First, there are apparently no reported Canadian cases where a stay has been granted in a divorce action on the basis of foreign proceedings or elements. One of the reasons for this may be that, as a practical matter, it may be very difficult to persuade a court not to assume jurisdiction once s. 5(1) is satisfied. The Ontario Court of Appeal has gone so far as to say that a petitioner is entitled to a divorce as of right, provided he satisfies s. 5(1) and proves one of the grounds set out in ss. 3 or 4 and that there are no facts which could make the bars contained in ss. 8 or 9 applicable. However, in that case, the court was not concerned with the question of a stay or international elements and the case could possibly be distinguished on that basis.

Certainly, there is merit to an argument that Canadians and those having a substantial connection with Canada ought to be allowed to have matters involving status settled here. Thus, perhaps the court should be quite careful in its consideration of the question of a stay when foreign proceedings are pending especially if, for example, foreign law does not afford similar rights to the petitioner. Nevertheless, it is submitted that there may be some situations in which a stay of divorce proceedings in a province may be justified when proceedings are pending abroad, or the case involves a foreign element. For example, H and W are married in England in 1970, where they are domiciled and live until 1975. H then deserts W, taking the only child of the marriage with him. H then acquires a domicile in Alberta in 1976 and in 1978, being able to satisfy s. 5(1)
of the Divorce Act commences proceedings for divorce and custody of the child. W still lives in England and has been unable to trace H until she is served with the divorce petition. In this situation, it is submitted that the Alberta court could refer to common law principles to determine the question of a stay of proceedings on the application of W, who wishes to have the matter determined according to English law.

The second reason for uncertainty in this regard is the fact that Canadian courts have subscribed to two theories on the question of stays, namely, the doctrine of forum conveniens and English common law. The principle of forum conveniens is simply that the court may, in its discretion, stay or dismiss an action if it is not a convenient forum, even if jurisdiction is authorized by statute. On the other hand, until some relatively recent decisions of the House of Lords, English common law required that proceedings be proved vexatious or oppressive before a stay would be granted. After the decision in *MacShannon v Rockware Glass Ltd.*, it may be that the distinction between English common law and the doctrine of forum conveniens will prove to be more a matter of semantics than anything else. In that case the majority of the House of Lords were in favour of discontinuing the use of the words "vexatious or oppressive" and Lord Diplock stated that in order to justify a stay two conditions must be satisfied:

"(a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English Court."
It is submitted that this reformulated rule is most appropriate for three reasons. First, the remedy is discretionary, which enables the court to consider all the circumstances. Second, it ensures in paragraph (a) that there will be another forum in which the case can be tried and thus, will not leave the petitioner without a forum. Third, the petitioner is assured by paragraph (b) that the stay will not be granted if it would deprive him of a "legitimate personal or juridical advantage". This wording seems broad enough to cover most, if not all, of the situations which could arise in the field of divorce.

The same appears to be true of the doctrine of forum conveniens. It too is a discretionary remedy, which has been held to be inapplicable when the other forum does not afford a plaintiff rights similar to those available in the forum province.

Therefore, in conclusion, it is submitted that either of the two theories, or both, are appropriate methods of controlling the choice of an unfair or inconvenient forum by a petitioner, when the case involves a foreign element. It is unfortunate that inter-provincial conflicts are not solved in a similar way.
CHAPTER 3

ALTERNATIVE METHODS OF ESTABLISHING JURISDICTION

Having concluded that the existing law of divorce jurisdiction is unsatisfactory, the purpose of this chapter is to consider alternative jurisdictional tests. The use of domicile, residence and nationality, or some form of combination of these factors will be examined, together with the potential use of stay and transfer provisions.

1. DOMICILE

The features and drawbacks of the concept of domicile have already been considered in the first chapter. Nevertheless, it is submitted that the domicile test continues to have some merit in terms of divorce jurisdiction, in that it can enable expatriates to petition for divorce on their return to Canada and, furthermore, permits the court to consider relevant factors other than simple residence. Indeed, in England and Australia, where there have been relatively recent changes in divorce jurisdiction, the concept of domicile has been retained as one of the alternative grounds for jurisdiction. New Zealand retains domicile as its principal test, although substantial reforms to the concept of domicile itself were made in the Domicile Act 1976.

In Canada legislative intervention has helped to eliminate some of the problems encountered with the concept. First, the wife's domicile of dependency has been abolished for divorce purposes and, second, the change from provincial to national domicile has made it easier to establish a domicile in Canada, thus alleviating, to some extent, the problems associated with tenacity of the domicile of origin and intention to
acquire a domicile of choice.

However, two further problems have emerged from the analysis of the Canadian legislation in the previous chapter: first, the fact that only the petitioner may satisfy the domicile test and, second, the fact that the domicile and residence tests are concurrent and not alternative requirements. For the reasons given in that chapter it is submitted that, in any future legislation, either the petitioner or the respondent should be able to satisfy the domicile test and, that it should be an alternative ground for jurisdiction, independent of any residence test. This is the case both in Australia and England.

Other reforms which could be enacted for divorce purposes, and which have already been enacted in Australia, include the abolition of the principle of revival of the domicile of origin, in favour of the continuation of the existing domicile until another domicile of choice is acquired. This solution seems more reasonable than the common law doctrine, since a petitioner who has abandoned a domicile of choice is presumably more likely to have some real connection with the domicile he has just left than with his initial domicile of origin.

The Australian Act also contains a provision dealing with capacity to acquire a domicile of choice, which would appear to solve problems similar to those which could arise in Canada. It provides that a person who has attained the age of eighteen years, or a person who has not attained that age but who has at any time been married, is deemed to have capacity to acquire a domicile of choice. In the Canadian context, it would be preferable for constitutional reasons to limit the application of any such provision to divorce purposes only.
Another concern which is raised, if federal domicile alone is to be sufficient to establish jurisdiction for divorce purposes, is the possibility of forum shopping or choice of an inconvenient forum within Canada by Canadian domiciliaries. It is submitted that the likelihood of such events would be greatly diminished by the enactment of adequate provisions for the stay and transfer of divorce petitions in appropriate circumstances. This subject is to be examined more fully later in this chapter.

2. **RESIDENCE**

There are several justifications for the adoption of residence as an alternative test for jurisdiction. This perhaps can best be shown by comparison with the objectives for jurisdictional rules laid out at the beginning of this part.

1. Clearly a residence provision would satisfy the first objective, in other words, it would enable a person to petition the courts of a province after he has lived there for a reasonable time.

2. The present combined test of domicile and residence does not satisfy the second objective, in that persons domiciled in Canada cannot petition any Canadian court if they are not currently residing in Canada within the interpretation of s. 5(1)(b) of the Divorce Act. Domicile as a separate test satisfies this objective.

3. As regards clarity and certainty of application, the third objective, residence is as effective as any test could be in view of the variable human elements involved in determining a person's home. A residence test would also help to remove the uncertainty which can arise in the domicile test as a result of the emphasis placed on intention.
4. An alternative residence test would certainly prove more convenient than the current Canadian rule. A Canadian resident wishing to petition the courts would have the choice of two bases on which to found his petition, and would be able to petition for divorce despite uncertainty about his future whereabouts, or despite the fact that he intends to leave Canada at some future date. An illustration may be helpful: W has been living in Ontario for the past twenty years but intends to emigrate to the United States and remarry, if she obtains a divorce. The present marriage was celebrated in Ontario and W has lived there since that time. Assuming that W cannot prove acquisition of a domicile of choice in law, W cannot at the present time petition for divorce in Ontario. However if there were a residence provision this would save the W the unwarranted inconvenience of searching for another forum in which to present her petition, such as England where her H is domiciled or habitually resident.

5. As far as limping marriages are concerned the domicile test only obviates limping marriages if other countries use the same concept. The concept of residence is more familiar to civil law countries. It is submitted that for reasons already discussed, residence would not tend to cause limping marriages.

6. Any possibility of forum shopping and choice of an inconvenient forum (objectives six and seven) would be substantially reduced if a specific period of residence were required. Indeed, the residence test in s. 5(1)(b) of the Divorce Act was imposed precisely to prevent forum shopping and inconvenience.

If a residence provision were to be enacted, the following questions
remain:
a) Who may satisfy the residence test?
b) Should "residence" be defined or qualified?
c) How long should the required period of residence be?

a) **Who may satisfy the test?**  

The same considerations apply as for the domicile provision above. Therefore it is submitted that residence of either the petitioner or the respondent ought to be sufficient.

b) **Should residence be defined or qualified?**

Two qualifying words have been used previously in divorce jurisdiction — "habitual" residence in England and "ordinary" residence in Canada and Australia. As has been shown the concept of "ordinary residence" has proved markedly unsatisfactory in Canada, owing to the diversification in its interpretation; on the one hand there are cases linking ordinary residence with the real home, and on the other cases linking ordinary residence with mere residence. If the word residence is to be qualified it would seem that "habitual" residence is preferable to "ordinary" residence. In fact one of the reasons given by the Law Commission in England for the adoption of habitual residence rather than ordinary residence was because of the cases linking ordinary residence with residence *simpliciter*, particularly dicta of Viscount Cave in the revenue case *Levene v IRC*.

"Habitual residence", on the other hand, is a rather elusive phrase which has been judicially defined as a "regular physical presence enduring for some time". The word "residence" itself is defined in Webster's International English Dictionary as "the act or fact of abiding or dwelling
in a place for some time". Given the similarity between these definitions, is the qualification "habitual" very helpful in the formulation of a residence provision? The courts in the past have linked "residence" fairly closely to physical presence, which is unfortunate because physical presence is only one of many factors which may warrant consideration. The main advantage of "habitual residence" is that it would seem to displace the emphasis on physical presence in favour of consideration of all the circumstances of the case. Another advantage of "habitual residence" is that it is an international concept approved by the Hague Conventions, and use of this phrase would further international uniformity in internal law.

The foreseeable disadvantage of introducing a new concept such as "habitual residence" is that it could lead to the build up of yet another large volume of case law on its interpretation, similar to that experienced with "ordinary residence". This does not appear to have happened in England, where "habitual residence" has been employed as a ground for both divorce jurisdiction and recognition of foreign divorces since the early 1970's. However, the one case which has analyzed the phrase is not a particularly clear authority.

An alternative and probably the best method to ensure consideration of all the circumstances of the case and reduce the emphasis on physical presence, would be the use of the word "residence" and a specific provision to the effect that reference is to be made to all the circumstances, but that "residence" is not to be terminated or interrupted by temporary or casual absences. The only question open to debate would then seem to be what is a "temporary" or "casual" absence?
It is submitted that such wording would be sufficient to cover regular vacations or short business trips away from the province in question. In the case of longer absences it would also prove to be a reasonable provision: a petitioner would either have to rely upon the domicile or residence of his or her spouse, or prove Canadian domicile, or wait until he or she has resided in a given province for the specified time period.

c) **How long should the required period of residence be?**

This is a purely arbitrary decision. In the past a one year period seems to have been popular. Both Australian and English legislation requires that the period of residence be at least one year immediately preceding the filing of the petition.

3. **NATIONALITY**

For over a century there has been controversy between the nationality and domicile principles as connecting factors in conflicts of law. In England nationality is not accepted as a basis for the assumption of divorce jurisdiction, but Australian legislation affords jurisdiction on the basis of the Australia citizenship of either party to the marriage.

Although nationality does have the advantage of relative continuity and certainty of application, this is subject to any changes which may be made in citizenship legislation, which of course may not be made with divorce jurisdiction in mind. This could lead to inconsistency.

In fact, several criticisms must be brought to mind when considering the nationality principle in terms of divorce jurisdiction. First, problems may arise as a result of dual or multiple nationality. Second, as a sole
test for jurisdiction, the nationality principle would not cover refugees or stateless persons. The fact that criteria for citizenship tend to be increasing in complexity, also militates against it as a sole test.

Perhaps the greatest threat posed by the introduction of citizenship as a ground for divorce jurisdiction is the possibility of forum shopping by a foreign domiciliary and resident. A petitioner with Canadian citizenship, prima facie, would be able to petition Canadian courts even if he had no factual ties whatsoever with Canada at the time of filing the petition. It is submitted that even the implementation of a discretionary stay provision would not be sufficient protection against forum shopping and inconvenience.

Another weakness of citizenship as a ground for jurisdiction is that common law countries used to base recognition on domicile and were unwilling to recognize divorces granted solely on the basis of citizenship. Assuming that *Indyka v Indyka* is the law in Canada then a decree given on the basis of citizenship will only be recognized in Canada if there was also a "real and substantial connection" between a party to the proceeding and decreeing law district. If *Indyka* is not the law in Canada then the court granting a decree on the basis of citizenship must also be the court of the domicile, or the decree must be recognized by the court of the domicile; otherwise recognition may not be afforded by the Canadian courts.

However English and New Zealand courts, for example, now recognize decrees granted on the basis of nationality or citizenship of either party to the foreign proceedings. Therefore, it seems that in years to come citizenship as a ground for jurisdiction will be less likely to cause a
limping marriage.

On a broader scale, it is arguable that domicile or residence alone provides sufficient grounds for the assumption of jurisdiction since both signify a choice of environment and lead to the application of the law of the country whose social and economic conditions are applicable to the petitioner or respondent. Both the domicile and residence tests promote more rapid integration of immigrants into Canadian society.

In conclusion, it is submitted that the introduction of the nationality as a ground for jurisdiction offers no significant advantage and could very well result in forum shopping and inconvenience to the respondent. Thus it is not recommended as an alternative ground for jurisdiction in this work.

4. STAY AND TRANSFER PROVISIONS

Discretionary provisions for the stay or dismissal of divorce petitions and for the transfer of petitions to other provinces are important in this context as a means of preventing not only forum shopping and choice of a forum on the basis of inconvenience to the respondent, but also duplication of petitions within Canada.

The adoption of such provisions in Canada would permit the court to consider all relevant circumstances, including convenience and expense when faced with proceedings which are pending in more than one court. They would also enable the court to evaluate competing claims more realistically at any stage, even if proceedings are pending only in one court.

Such provisions do exist both in England and Australia. What
follows is an analysis of those implemented in Australia, with a view to
the adoption of similar provisions in Canada.

Section 45(1) of the Australian Family Law Act 1975-6 provides:

45.(1) Where it appears to a court in which a matrimonial cause
(including a matrimonial cause instituted before the
commencement of this Act) is pending that a matrimonial
cause (including a matrimonial cause instituted before
the commencement of this Act) in respect of the same
marriage or void marriage is pending in another court,
the first mentioned court may stay the proceedings in
that first mentioned court for such time as it thinks fit
or may dismiss the proceedings.

Thus the court may in its discretion stay or dismiss a matrimonial
cause (including divorce proceedings) if other matrimonial causes are pending
elsewhere; presumably the court may do so of its own motion without application
from either party. For the purposes of the Divorce Act of Canada it would
probably be wise to limit the court's power to situations where divorce
proceedings are pending before it, in order to avoid potential constitutional
problems.

Nowhere in the Family Law Act does it expressly say which criteria
are to be employed in determining whether to stay divorce proceedings, and
it is unfortunate that the court was not given any guidelines. However,
it has been held that the considerations laid out in regulation 102 of the
Family Law Regulations (which relate to a different provision) are to
apply. Regulation 102 provides:

102. **Transfer of proceedings to the Family Court**

(2) In considering the application, the Family Court shall
have regard to--
(a) the availability of a court to hear the proceedings;
(b) the convenience of the parties;
(c) the limiting of expense and the cost of the proceed-
ings; and
(d) any other relevant matter.
It should be noted that nothing in s. 45(1) suggests that the provision should not apply to proceedings which are pending abroad, in other words in a court outside Australia. It is submitted that, although the criteria in r. 102(2) *prima facie* apply to proceedings within Australia, they should also be used in order to decide whether to stay or dismiss proceedings in the light of pending proceedings abroad. It is also submitted that the word "application" in r. 102(2) should not prevent the court from resorting to the considerations therein if it is acting on its own motion.

The Australian courts also have power to transfer proceedings to another court having jurisdiction under the Family Law Act if it is "in the interests of justice" to do so, even if only one action is in existence at the time of the application. Regulation 102(2) seems to apply to this situation as well. There is also provision for the transmission of court papers in these circumstances.

5. **RECOMMENDATIONS**

The recommendations below represent the submissions made in this and the preceding chapters and are presented in the form of model legislation. If adopted, it is envisaged that they would be enacted as amendments to the Divorce Act and that the current sections 5(1) and 5(2) would be repealed.

1. (1) The court for any province has jurisdiction to entertain a petition for divorce and to grant relief in respect thereof if,

   (a) either the petitioner or the respondent is domiciled in Canada when the petition is filed or

   (b) either the petitioner or the respondent has been resident in that province for a period of one year immediately preceding the filing of the petition.
1. (2) For the purposes of this Act,
   (a) a person's domicile at any time, howsoever acquired, shall be deemed to continue until that person acquires another domicile and the rule of law known as the doctrine of revival of the domicile of origin is hereby abolished; and
   (b) every person becomes capable of acquiring an independent domicile at the age of eighteen years or on marriage, whichever is sooner.

2. (1) Where it appears to a court in which a petition has been filed under this Act that,
   (a) other matrimonial proceedings in respect of the same marriage, or capable of affecting the validity or subsistence of the same marriage, are continuing in another country or another court having jurisdiction under this Act and,
   (b) it is in the interests of fairness (including convenience) that those proceedings be dealt with first,
   the court may, in its discretion, stay the petition for such time as it thinks fit or dismiss the petition.

(2) Where it appears to a court in which a petition has been filed under this Act that, in the interests of fairness (including convenience), the petition should be dealt with by another court having jurisdiction under this Act, the court may, in its discretion, transfer the petition to the other court.

(3) In considering the interests of fairness and convenience for the purposes of subsection (1)(b) and (2), the court shall have regard to all the circumstances of the case, including, without restricting the generality of the foregoing,
   (a) convenience to the spouses (including the convenience of witnesses) and
   (b) any delay or expense which may result from either staying or transferring the petition or not staying or transferring the petition, and
   (c) the availability of a court to hear the proceedings.
(4) Where an order to transfer a petition is made under subsection (2) of this section, the court papers shall be transmitted by the registrar, or other proper officer of the court, to the court to which the petition has been transferred; thereafter the court to which the petition has been transferred shall continue as if the petition had been originally filed in that court.

(5) In this section the word "petition" includes a cross petition.

(6) The court may exercise its powers under this section at any time and at any stage of the proceedings either on its own motion or on the application of the petitioner or respondent.
PART 11 - RECOGNITION

CHAPTER 4

1. INTRODUCTION

The purpose of this part is to study the Canadian rules for recognition of divorces granted in other jurisdictions, and ultimately to formulate recommendations for statutory reform in Canada. As s. 14 of the Divorce Act already provides for recognition of decrees granted by Canadian courts, the chief concern of this part is the recognition of truly "foreign" divorces - in other words, divorces obtained outside Canada.

Before analyzing the current Canadian rules, the common law grounds, as they existed prior to the decision in *Indyka v Indyka* and the passing of the Divorce Act in 1968, will be examined in order to provide a background to the present law. After an analysis of the Canadian position, the English Recognition of Divorces and Legal Separations Act 1971 will be considered.

2. OBJECTIVES OF THE RECOGNITION RULES

It is useful to enumerate at the outset the suggested criteria for model recognition rules.

1. The primary objective should be the avoidance of limping marriages. This necessitates the formulation of broad rules in order to secure recognition for divorces granted under different systems of law.

2. The rules should not lead to hardship and anomalies. The word "hardship" is used in preference to "convenience" in this part because of the grave consequences which could arise as a result of non-recognition
of a foreign divorce: subsequent marriages on the strength of a foreign
decree would be bigamous and void; the children of such marriages at
common law would be bastardised; the "wife" would not be entitled to succeed
to the deceased "husband's" estate as his "widow".

3. The rules should be as clear and certain in their application as
possible.

4. With regard to the prevention of forum shopping, it is clear that
this objective conflicts with the first objective, namely, prevention of
limping marriages. Thus, its importance in relation to divorce recognition
is debatable.

On the one hand, if all divorces were recognized, and Canadians knew,
for example, that a divorce would be recognized despite the fact that they
had no connection whatsoever with the decreeing jurisdiction, they may be
encouraged to resort to a lax jurisdiction because of the ease and inexpense
of obtaining a divorce there. Certainly, it is reasonable that Canadians
should be required to conform with the law (including the divorce law) of
their own country and should not be allowed to circumvent it.

On the other hand, it may be argued that forum shopping has already
taken place when the question of recognition arises and by that time it is
too late to prevent it. Of course, this does beg the question of encouragement
of forum shopping.

A further argument against the importance of forum shopping is that
as long as the divorce laws of Canada are reasonable, it is not likely that
Canadians will seek divorces abroad.

5. Regardless of the view one takes on the question of forum shopping,
it is submitted that there should be some tangible connection between at
least one of the spouses and the jurisdiction granting the decree.

3. THE COMMON LAW BEFORE 1967

The purpose of this exposition is to examine the grounds on which a divorce, obtained elsewhere, was recognized in Canada prior to the decision in *Indyka v Indyka* and the Divorce Act. In order to understand fully the past and present Canadian position, it is necessary to examine the common law as it stood in England before the statutory reform in 1971, since the Canadian rules were and still are largely based on the English common law.

At this point it should be noted that there is always a discretion in the court to refuse recognition, if to recognize the decree, *inter alia*, would cause a substantial injustice or if the decree was obtained by fraud. This aspect of recognition will be dealt with in a later chapter and is not considered here.

Before the *Indyka* case there were three possible grounds for recognition of foreign divorces in England and Canada.

a. **Domicile**

Towards the end of the nineteenth century it became accepted both in England and Canada that the sole test for recognition was domicile of the parties to the divorce within the jurisdiction granting the decree at the time the proceedings were instituted. In this context, "domicile" must be proved, not by reference to the requirements of the jurisdiction granting the decree but, in accordance with its definition by the law of the forum, i.e. Canada. At common law this effectively meant "domicile of the husband", since the wife took her husband's domicile by dependence. The substantive
grounds on which the decree was obtained are immaterial.

b. Armitage v A-G

(i) England

In 1906 Armitage v A-G extended the domicile rule and enabled the courts to recognize, inter alia, American divorces in the U.K. even though they were not obtained in the state of the parties' domicile. The facts of the Armitage case were that an American, domiciled in New York State, married an English woman in England. The marriage broke down and the wife, who had moved to live in South Dakota, obtained a divorce in the latter state despite her husband's domicile in New York. Sir Gorell Barnes was satisfied by expert evidence that the divorce would be recognized by the law of the domicile, New York State, and held that the decree should be recognized in England.

Thus, the rule known as the rule in Armitage v A-G was formulated, namely, that a divorce must be recognized as valid in England if it is recognized by the law of the domicile of the parties. The justification given for this was that if the status of the parties is changed or recognized as changed in the country of their domicile, then it is logical that the change should be recognized in England.

It is not certain whether domicile refers to domicile at the date of institution of proceedings or domicile at the date of the decree. But the court in Armitage did say "...(the parties) have ceased to be husband and wife in the place where they were domiciled at the date of the decree." This could be read in two ways: first, that the parties ceased to be husband and wife "at the date of the decree", which does not indicate the time at
which domicile must exist; or, second, that the relevant time is "domicile at the date of the decree". It would be more logical perhaps if the relevant time was the same as for the domicile test itself, in other words, domicile at the date of institution of the proceedings. However, it is submitted that domicile at the date of the decree would be preferable, since this would be more likely to prevent limping marriages. For example, A petitions for a divorce in country X and his country of domicile, Y, would recognize the decree; but before the decree is pronounced A changes his domicile to Z country, which would not recognize the decree. In this situation the English courts would be adding to future problems if they recognized the decree which A's new domicile, Z, refused to recognize. Likewise, a limping marriage would be created by the English courts if they refused to recognize a divorce obtained by A, if, between presentation of the petition and the decree absolute, A had changed domicile from a law district which would not recognize the decree to one which would.

(ii) Canada

The rule in *Armitage v A-G* has been approved by the Supreme Court of Canada and the Alberta Court of Appeal; it has been followed in Ontario and in British Columbia by the British Columbia Court of Appeal. Thus a foreign divorce would be recognized in Canada if it were recognized in the jurisdiction of the parties' domicile.

In *Walker v Walker* it was held that the rule in *Armitage* applied if, *prima facie*, the divorce would be recognized in the state of the domicile, and the respondent in that case was not permitted to adduce evidence that the foreign court was without jurisdiction or that the decree was obtained by fraud. However, if *prima facie* the divorce would not be recognized in
the state of the domicile, and further enquiry would be necessary to
determine recognition, the rule in Armitage has been held to be
inapplicable.

In Yeger and Duder v Registrar General of Vital Statistics it was held that Armitage does not apply if the relevant domicile is the province in which recognition is sought. The facts were that H married W in Hungary in 1923, where they were both domiciled. In 1929, after deserting his wife, H became domiciled in Alberta and continued to be so domiciled. In 1956, the wife, having become a citizen of West Germany, obtained a divorce in a German court. The Alberta Supreme Court held that the application of the Armitage principle in such circumstances would be absurd, since the rule would read: if the law of Alberta (the domicile in the Canadian sense) would recognize the foreign divorce then the courts of Alberta would recognize its validity.

The question of the relevant time for the purposes of the rule in Armitage, which has been mentioned above in relation to England, came squarely before the Supreme Court of Canada in Schwebel v Ungar and it is arguable that the decision was an extension of the rule in Armitage.

The facts were that Waktor, who had lived for two years in Israel, married D in Hungary on his return. Shortly afterwards the couple escaped from Hungary, which was their domicile of origin, intending to make their way to Israel to live permanently. While en route the pair were extra-judicially divorced by means of a Jewish "gett" in Italy. This divorce was invalid in Hungary and Italy, but valid by the law of Israel, where they both became domiciled within two weeks. Some time later D came to Canada as a visitor, and met and married P in Ontario. P obtained a
declaration of nullity of marriage on the ground that D was already married at the time of the second marriage. D appealed.

The two issues were:

1) the capacity of D to remarry -- which is normally governed by the law of the antenuptial domicile.

2) the validity of the Italian divorce decree -- which is normally governed by the private international law rules of the forum (Ontario) -- and the effect of the validity or invalidity of the divorce on D's capacity to remarry.

The Ontario Court of Appeal held that the validity of the second marriage was determined by D's capacity to marry according to the law of her domicile at the time of the second marriage, i.e. Israeli law. Since by Israeli law she was capable, the Ontario marriage was valid, notwithstanding that the divorce was not recognized by the law of the domicile at the date of the divorce (Hungary). Two justifications were given by McKay J.A.: first, that to hold otherwise would be determination of a person's status by the lex fori (Ontario) and not by the law of the domicile (Israel); second, the prevention of limping marriages.

Ritchie J. in the Supreme Court of Canada found that the evidence was insufficient to hold that Waktor was domiciled in Israel, despite his residence there for two years prior to his marriage. The court approved the rule in Armitage and said that, as a general rule under Ontario law, a divorce would not be recognized unless it would be recognized under the law of the country where the husband was domiciled at the time when it was obtained. This indicates that the relevant time to determine domicile for the purposes of the rule in Armitage in Canada
is normally to be domicile at the date of the decree.

Ritchie J. went on to approve the decision of the Court of Appeal. It was held, on the facts of the case at bar, where domicile in the recognizing country was acquired less than three weeks after the divorce, that there should be an exception to the general rule and that the divorce should be recognized in Ontario. Unfortunately, the ratio of the case was complicated by the further comments of Ritchie J., when he stated that the governing consideration was the status of D and not the means whereby she secured such status (the divorce).

Clearly this was the most equitable solution, but what effect did it have on the general rule in *Armitage* as stated by Ritchie J? Several interpretations are possible.

If one construes the judgment to mean that the validity of the second marriage depended solely on capacity or status, the rule in *Armitage* is not affected.

24 Lysyk has explained the decision in terms of the "incidental question" -- the validity of the divorce being incidental to the principal question of capacity. *Schwebel v Ungar* would then be authority that the *lex causae* (Israel) and not the *lex fori* governs the incidental question.

If capacity to marry depended on the validity of the divorce under Ontario rules of private international law then the decision is an extension of *Armitage*. It has been said that the scope of such an extension is doubtful. For instance, it is not clear whether recognition in the first acquired new domicile would be conclusive, or whether
validity of the divorce could be affected with each subsequent change of domicile. It is submitted that the best interpretation would be to view *Schwebel v Ungar* as an application of the *de minimis* principle to the rule in *Armitage* for the sake of equity.

Alternatively it could be said that, where there are two conflicting rules of private international law, the court should choose the more equitable solution as between the parties.

In any event, by 1967 it was established that a divorce will be recognized in Canada if it is recognized in the country of the parties' domicile at the date of the decree and, possibly, if it is recognized in a country where a domicile is acquired shortly after the decree.

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c. *Travers v Holley* — Reciprocal Recognition?

i) **England**

The third ground for recognition came into existence after statutory inroads had been made into the domicile rule for divorce jurisdiction. These statutes were enacted mainly in order to mitigate the potential hardships caused to the wife by the doctrine of unity of domicile.

In *Travers v Holley* a husband and wife who were domiciled in England went to New South Wales after their marriage, because the husband believed that Australia offered better prospects. As it turned out he was unsuccessful in Australia, left the matrimonial home, and was eventually transferred from the Australian army to the British Army in 1943. Meanwhile, the wife petitioned the New South Wales court for a divorce on the ground of the husband's desertion, and obtained a decree under a New South Wales deserted wives statute, which was very similar in terms to s. 13 of the English
Matrimonial Causes Act 1937.

The Court of Appeal held, by a majority, that the husband was domiciled in New South Wales at the time of desertion, which was the relevant time under both the New South Wales and the English statutes, and therefore that the divorce should be recognized.

Somervell L.J. said:

"On principle it seems to me plain that our courts in this matter should recognize a jurisdiction which they themselves claim."

Hodson L.J. found that the 1937 legislation concerning jurisdiction changed the position regarding recognition of foreign divorces also, so that domicile was no longer the sole basis of recognition. In a passage which has since been quoted frequently, he said: "I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognize a jurisdiction which mutatis mutandis they claim for themselves."

Thus substantial "reciprocity" became a basis for recognition of overseas divorces. With respect to the learned judge, it is submitted that this usage of the word "reciprocity" was incorrect. Reciprocity normally means that X country will recognize Y country's right if Y country recognizes those of X. But in Travers v Holley it was used to mean that an English court will recognize Y country's decrees (or jurisdiction) if Y courts have jurisdiction similar to that of English courts.

Clearly the basis of recognition in Travers v Holley was similarity
of jurisdiction, not reciprocity. Because of the similarity of jurisdiction the English court felt compelled by a unilateral sense of justice to recognize the decree. Therefore, it is submitted that the statement of Somervell L.J., above, was more correct.

The question arose: how similar did the grounds of jurisdiction in the foreign country have to be, in order to gain recognition in England; or, in other words, what was meant by "substantial reciprocity?"

Kennedy was of the opinion that the basis of jurisdiction in the foreign court did not have to correspond exactly to the basis of jurisdiction under the English statutory provisions. He felt that: where the substance of the legislation was deserted wife legislation, the details of time did not matter; where the substance of the legislation was jurisdiction based on residence, the length of residence was immaterial, provided that it did not detract from the substance. It is submitted that this was the more equitable and reasonable view.

However, it was held that *Travers v Holley* was only applicable in cases where the extraordinary jurisdiction exercised in the foreign court corresponded almost exactly to the English extraordinary (statutory) jurisdiction; the English courts would recognize the right of the foreign courts to encroach upon the principle of domicile only to the extent that the English courts were themselves able. If, for example, the English statute conferred jurisdiction over the wife after three years residence, then in order for a foreign decree to be recognized, the wife must have been resident within the jurisdiction of the foreign court for at least three years.

But it was not necessary that the foreign court actually assumed
jurisdiction on the same basis as the English court; it was sufficient if facts existed which would have enabled the English court to assume jurisdiction. Thus, in Robinson-Scott v Robinson-Scott a Swiss divorce was recognized because the wife had been resident in the territory of the Swiss court for over three years, and under those circumstances the English court would have had jurisdiction under s. 18(1)(b) of the Matrimonial Causes Act 1950. It was immaterial that the Swiss Court actually took jurisdiction on the basis of domicile in the Swiss sense -- a concept wholly unknown to English law. It was also immaterial that the ground of divorce was one which was not available in England.

Of course, Travers v Holley could only apply where the wife obtained the divorce, or where in reality the divorce was awarded to the husband and wife jointly, and not where the husband alone obtained the divorce. (The reason for this was that the additional statutory jurisdiction which was conferred on the English courts was only applicable to the wife).

In Mountbatten v Mountbatten Davis J. held that the rule in Travers v Holley could not be combined with the rule in Armitage v A-G. In that case the husband and wife, who were domiciled in England, married in the United States in 1950 and lived in New York. The husband returned to England and the wife obtained a divorce from the Mexican court in 1954. She had resorted to the Mexican jurisdiction solely for the purpose of obtaining a divorce and the Mexican court assumed jurisdiction on the basis of her presence in the jurisdiction. Evidence was adduced to show that the divorce would be recognized in New York State, where the wife had been ordinarily resident for four years. Davis J. rejected the contention that the decree should be recognized owing to recognition in the state of
the wife's residence, and said that this would be a wholly illegitimate extension of *Travers v Holley*. Had the wife been domiciled in New York State instead of merely resident there, the court would presumably have had no option but to recognize the divorce pursuant to the rule in *Armitage v A-G*.

The court also pointed out that England was the court of the domicile and gave an example of the "impossibility" of extending the rule in *Travers v Holley* to the *Armitage* - type situation. He said:

"Suppose a husband and wife domiciled in, say, Victoria, Australia. The wife goes off to New York and ordinarily resides there for over three years. She then goes to Mexico and obtains a decree there in similar circumstances to those in which the present wife obtained her decree. That Mexican decree is not recognized by the courts of the domicile, Victoria, but is recognized by the courts of the wife's residence, New York. In subsequent proceedings in the English courts the validity of the Mexican decree is called in question -- for example, in proceedings as to legitimacy or inheritance after a subsequent marriage of one of the parties. This court would be faced with the position that the Mexican decree was not recognized by the court of the domicile but was recognized by the court of the wife's residence. Can it possibly be doubted that this court would hold, following the court of the domicile, that the decree was not entitled to recognition?"

This argument was equally applicable to the application of *Travers v Holley* itself, and because of this potential conflict, it was suggested that *Travers v Holley* did not apply if the parties were domiciled abroad. However, there was no authority on the application of *Travers v Holley* where the parties were domiciled abroad, and/or in a country which would not recognize the validity of the decree obtained otherwise than on the traditional bases.

The rule in *Travers v Holley* probably operated retroactively to validate divorces obtained even before the relevant English statutes were enacted. Since this was the narrow point for consideration in *Indyka v*
ii) Canada

Before 1967 it was not certain whether *Travers v Holley* would apply in all or any of the provinces in Canada.

The rule was applied in Manitoba in *Januszkiewicz v Januszkiewicz*. Nitikman J. found assistance from the decision of the Supreme Court of Canada in *Schwebel v Ungar* and that there could be an exception to the domicile rule. It was also held that the grounds for divorce need not necessarily be the same as the Canadian grounds provided that the foreign jurisdiction is recognized.

In Ontario *Travers v Holley* was approved in principle by the Ontario Court of Appeal in *Re Capon*.

The rule has also been applied in Alberta in *B and B v The Deputy Registrar of Vital Statistics* and in *Re Allarie*, both of which also gave approval to the principle laid down in *Robinson-Scott v Robinson-Scott* -- that it was sufficient for recognition if facts existed which would have enabled the Alberta court to assume jurisdiction. Curiously though, in the *B and B* case, Milvain J. not only took into account the similarity of jurisdiction between the foreign law district and Canada, but also the similarity between the substantive grounds of divorce -- a factor which is not normally relevant.

The rule was not followed in *La Pierre v Walter*, where Riley J. of the Alberta Supreme Court refused to recognize a Scottish divorce based on three years residence of the wife, when the husband was at all material times domiciled in Alberta. This case can be explained on
several grounds:

1) Riley J. was understandably unaware of *B and B v The Deputy Registrar of Vital Statistics* which was decided on January 28, 1960. The *La Pierre* case was decided on February 26, 1960 but the reasons for judgment of Milvain J. in the *B and B* case were not issued until March 9, 1960.

2) If "reciprocity" and not similarity of jurisdiction were the basis of recognition, then Riley J. may have been influenced by the fact that *Travers v Holley* was not approved in Scotland.

3) The most reasonable explanation of *La Pierre v Walter* is that *Travers v Holley* did not apply because there was no substantially similar jurisdiction in Alberta, in other words, there was no jurisdiction on the basis of residence in Canada. At that time the only legislation concerning jurisdiction in divorce was deserted wife legislation.

Thus it was certain that, if *Travers v Holley* were to apply in Alberta, the de facto grounds of jurisdiction had to correspond almost exactly to the grounds of jurisdiction under the Canadian legislation in the Divorce Jurisdiction Act of 1930.

d. Summary

Before *Indyka* there were three grounds for recognition of foreign divorces in England -- namely, domicile and the rules in *Armitage* and *Travers v Holley*.

In Canada a divorce would be recognized:

1) if the parties were domiciled in the country granting the decree at the time of institution of proceedings;

2) if the divorce was recognized in the country of domicile at the
date of the decree, and possibly if domicile in the recognizing country 63
was acquired shortly after the decree;
3) possibly if facts existed which would have been sufficient to found 64
jurisdiction under the Canadian statutory provision.

Clearly these were rather narrow, rigid grounds of recognition
which tended to increase the number of limping marriages, even when the
decree of divorce was obtained in other common law jurisdictions, such as 65
Scotland.

4. 1967-71 ENGLAND -- INDIKA v INDIKA

This infamous case and its application has been the subject of 2
much academic writing in the past. An attempt will be made to analyse 3
briefly the judgments of the five Law Lords who were present, although
it is recognized that no precise ratio could be drawn therefrom. However,
together with an examination of the English cases concerning the application
of Indyka, this exposition may facilitate comprehension of the current
position in Canada and may be indicative of potential developments in
the recognition rules in Canada.

Shortly stated, the facts before the court were that W, who had always lived in and was a national of Czechoslovakia, was granted a divorce by the Czech court which became final in February 1949, shortly before the passing of the Law Reform (Miscellaneous Provisions) Act 1949. (This enabled a wife to petition in England on the basis of three years residence). The husband, H, also Czech by birth had acquired a domicile of choice in England soon after the war. In 1959 he married W2 in England, and in 1964 W2 petitioned the English courts
for divorce. H claimed by way of amended answer that the Czech decree was not valid in England and, therefore, that he was still lawfully married to W and never validly married to W₂.

The issue directly before the court was whether the rule in *Travers v Holley* could be applied retrospectively. Was the Czech divorce validated even though it was obtained before the relevant English statute, and before the English court could have assumed jurisdiction in the circumstances of W?

At first instance Latey J. held that the Czech decree was invalid in England because the principle of *Travers v Holley* was applicable only to decrees obtained after December, 1949, when the English statute was enacted.

The Court of Appeal, by a majority, reversed this finding and held that *Travers v Holley* operated retrospectively to validate the divorce.

The House of Lords unanimously dismissed the appeal, but each of their Lordships differed with regard to the precise grounds on which their decision rested. The one certainty is that all of their Lordships were in favour of wider bases of recognition for foreign divorces.

a. **Reasons for the Wider Rule(s)**

The House gave various reasons for the adoption of wider recognition bases. These were:

1) differences which had emerged in the concept of domicile in other countries;

2) domicile was not the only commonly accepted connecting factor;

3) it was also felt that changed social habits, increased inter-country
travel, mobility, and thus increased inter-country marriages had increased the possibility of the "scandal" of limping marriages. Thus, public policy demanded that a more flexible attitude be taken towards foreign divorces in order to prevent limping marriages. Lord Reid stated:

"... but once we get rid of the idea that there can only be one test and that there can never be jurisdiction in more than one court, it seems to me to be very much in the public interest that there should be some other test besides that of domicile."

4) Also, the statutory inroads into the law of domicile in divorce jurisdiction made it unnecessary to maintain any longer that the rigid rule of domicile was the only test. Since Parliament had not interfered with the common law recognition test, it was open to the House to modify the common law. Lord Pearson stated:

"Now the former system is no longer maintainable. It has been undermined and discredited by its disadvantages and the changes in general conditions and the passing of the two enactments to which I have referred. It no longer stands in the way of a realistic and reasonable view being taken of the range of cases in which validity should be accorded in England to divorces granted in other countries."

Their Lordships advocated more general, relaxed grounds, but what were they?

b. Matrimonial Home

Lord Reid differed most from the other Law Lords; he alone advocated a return to the old notion of location of the "matrimonial home" as the basis for recognition.

c. Nationality

All of their Lordships were in favour of giving weight to the factor of nationality, but to varying degrees. Lord Pearce was in favour of recognition on the basis of nationality alone, and Lord Wilberforce was
in favour of nationality "in appropriate circumstances". It was also accepted as a factor in determining "real and substantial connection" which is discussed below.

d. Residence

Similarly, there was general agreement that weight should be given to the factor of residence to determine "real and substantial connection". Lord Pearson felt that there was difficulty in recognition on the basis of a merely residential qualification, but he did say that "The broad distinction is between a person who makes his home in a country and a person who is a mere sojourner there."

Lord Reid saw no wrong in recognizing a decree given to a wife who was habitually resident within the decreeing jurisdiction; and Lord Wilberforce thought "it may be possible ... for judicial decision to allow recognition generally to decrees based on the non-domiciliary residence of the spouses."

e. The Real and Substantial Connection

With the exception of Lord Reid, the House felt that recognition should be accorded on the basis of a "real and substantial connection" with the decreeing jurisdiction. Residence and nationality were considered as factors which could "reinforce the connection".

Lords Morris and Pearson seemed to feel it was necessary to establish citizenship combined with a real and substantial connection. A majority, Lords Morris, Pearce and Wilberforce, envisaged that the real and substantial connection test would be applicable to a wife only; Lords Wilberforce and Pearce explicitly stated that the test would be applicable to a wife petitioner.
Lord Morris said:

"The evidence was that the Czech court accepted jurisdiction on the ground that both parties were and always had been Czechoslovakian citizens. The first wife at the time when she presented her petition in Czechoslovakia undoubtedly had a real and substantial connection with that country. I see no reason why the decree of the Czech court should not in those circumstances be recognized." (Emphasis added)

Lord Pearce said that we should "regard our own jurisdiction as only the approximate test of recognition with a right in our courts to go further when this is justified by special circumstances in the petitioner's connection with the country granting the decree." But it was clear from the justifications given that Lord Pearce was speaking in terms of a wife petitioner: These were: first, that refusal to recognize the decree would punish H who stays in England but would not deter the wife who lived abroad; second, that recognition of a divorce acquired abroad fitted in with the not unreasonable scheme of an independent domicile of the wife for divorce purposes.

Lord Wilberforce said: "It would be in accordance with developments I have mentioned and with the trend of legislation ... to recognize divorces given to wives by the courts of their residence wherever a real and substantial connection is shown between the petitioner and the country or territory exercising jurisdiction."

However the speeches of their Lordships could be interpreted as mere general guidelines for the courts in future cases -- a kind of stop-gap measure pending parliamentary action. For instance, Lord Morris said: "There may in other cases, be further and different bases for recognition", and later in the same paragraph:

"Unless by legislation some code can be enacted the courts will be left to deal with problems as and when they arise."
Finally, Lords Pearson and Pearce expressed the limitations to recognition; a decree obtained by fraud or offending against substantial justice was not to be recognized. They were also of the opinion that the foreign decree should not be recognized if it was not a "genuine" divorce, or where the court was used for the convenience of "birds of passage". The facts of Mountbatten v Mountbatten, where a divorce was obtained from the Mexican court after one day's presence, were given as an example of such a divorce.

f. What remained of the pre-existing rules?

i) Domicile

None of their Lordships suggested that domicile should no longer be a test of recognition, merely that it should no longer be the only test. Lords Pearce and Wilberforce were of the opinion that the primary court of reference was still to be the court of the domicile.

ii) Travers v Holley

Travers v Holley emerged "comparatively unscathed". The majority held that it was wholly retrospective in application. However, the reciprocity basis of the decision was criticized heavily by Lord Reid.

It was also felt that Travers v Holley should not be a cast-iron rule, to be affected by each piecemeal legislative reform of the jurisdictional rules, and that consideration should always be given first to the character of the legislation involved.

In any event, the rule was applied shortly after Indyka v Indyka by Simon P. in Tijanic v Tijanic. Likewise, the principle in Robinson-Scott v Robinson-Scott was applied in Brown v Brown. But it was
unlikely that the rule was thereafter of any real value, since there would probably be a "real and substantial connection" in the *Travers v Holley* type situation.

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g. *Post-Indyka*

Admittedly, most of the decisions which followed *Indyka* were undefended and, therefore, some of the inconsistency and arbitrary extensions of its application may be accounted for on the basis that the judges in question did not have the benefit of a full argument; but it is hard to conceive of a more inconsistent group of cases.

The sheer amount of litigation between 1967 and 1971 is indicative of the uncertainty which was bound to arise from the lack of specific ratio decidendi in the House of Lords' decision. Lord Wilberforce said:

..."I have no fears that uncertainty will be introduced into the law. The courts are well able to perform the task of examining the reality of the connection between the resident petitioner wife and the jurisdiction invoked, bearing in mind, but not being rigidly bound by, the developments of domestic jurisdiction."

That was precisely the problem. Since no outsider could determine when the foreign decree would be recognized on the basis of a real and substantial connection, it was necessary to go to court to find out. Thus, it was not so much that divorces from overseas were recognized after 1967 in circumstances which did not justify recognition, but that there was no specific code of recognition on which lawyers could rely when advising their clients.

A "real and substantial connection" was held to exist on the basis of residence in the foreign jurisdiction for one year, fifteen months, and two and a half years immediately preceding the granting of the decree. But residence of less than one year was insufficient to show
"substantial" connection, at least, if there were no other additional factors. Also, the mere fact of celebration of the marriage in the decreeing jurisdiction was not sufficient to establish "real and substantial connection" if there was insufficient subsequent residence.

Nevertheless, in *Angelo v Angelo* residence of the wife petitioner for three months in Germany was held sufficient to satisfy the test. In the *Angelo* case the wife was a national of Germany and had lived there throughout her unmarried life. In that case the court preferred Lord Reid's test of habitual residence of the wife, and in reality the divorce was recognized on the basis of her habitual residence in Germany.

The relevant date for determining "real and substantial connection" was not clear from the case law; it seems that this feature of the test was not the subject of detailed consideration. This reflects the trend of a more flexible attitude towards recognition of foreign divorces.

In *Blair v Blair* it was held that the petitioner satisfied the test even though he had severed his connection with the jurisdiction by the time of the petition. In *Welsby v Welsby*, however, Cairns J. indicated that the relevant time was the date of the decree, when he said that the fact that the wife had remained in the decreeing jurisdiction for a further two and a half years after the divorce, could be taken into account as an indication of no present intention to leave at the time of the decree. Thus residence after the divorce was taken into account and it can be said that conduct of the wife, after the pronouncement of the decree, could be taken into account to determine whether or not there was a real and substantial connection.

In *Mather v Mahoney* a Nevada divorce was recognized on a combination
of the principles in *Armitage v A-G* and *Indyka*; the divorce was recognized because it would have been recognized in Pennsylvania, a law district with which the wife had a real and substantial connection.

In *Messina v Smith* a divorce obtained in 1946 was recognized, when the wife had been resident in the United States for six years, but had obtained a divorce in Nevada after only six weeks residence there.

The distinction drawn between the *Messina* case and the earlier case of *Mountbatten v Mountbatten* was that: in the former case, the divorce was regarded as "genuine" by the "home" state and that the constitution of the United States required recognition of such divorces throughout the country; while in the latter, recognition of the Mexican decree "was a matter for the law of each individual state", and was a blatant example of forum shopping. This seems to be a somewhat fictitious distinction, since in the *Mountbatten* case, the wife petitioner was normally resident in New York and New York State did in fact recognize the Mexican divorce. Both cases involved forum shopping. In *Messina v Smith* it took place within the United States, while *Mountbatten* involved the Mexican courts.

Perhaps a better explanation for the distinction between the two cases would be to say that after *Indyka* a real and substantial connection with the United States as a whole was sufficient to justify recognition of an American decree, regardless of the state which granted it.

h. **Retroactivity?**

The *Messina* case also indicated that the *Indyka* test was retroactive since the divorce was obtained in 1946.

North pointed out the difficulty of a retrospective test, namely, that there may be confusion if some intervening act takes place which relies
on the invalidity of the divorce. The typical example would be that of 
H divorcing $W_1$ in 1944, and remarrying $W_2$ in 1945. $W_2$, acting on good 
legal advice in 1946, decides that the 1944 divorce was invalid, owing 
to the narrow grounds of recognition at that time. $W_2$ leaves $H$ and 
remarries herself in 1947. Could Indyka (or, Travers v Holley, if 
$W_1$ obtained the divorce) have the effect of retrospectively validating 
the 1944 divorce and the 1945 marriage, with the result that $W_2$'s second 
mariage is invalid?

North suggested that the operative date for determining the validity 
of the divorce should be the date of the intervening act or "matter in 
issue". In those circumstances there would be full retroactivity, 
unless there was an intervening matter in issue, such as a subsequent 
mariage.

The problem with this solution is that it could lead to anomalies, 
since one may not know of the pre-existing intervening act at the time of 
the action. To take the above example: $H$ could petition in England for 
a declaration of validity of the 1944 divorce, or the second marriage in 
1945, after the decision in Indyka, but may not know of the whereabouts of 
$W_2$, or may not discover her remarriage, until after the declaration of 
validity of the 1944 divorce or the 1945 marriage.

It seems that the potential problem of the intervening act which 
relies on the invalidity of the divorce is inevitable, if divorce 
recognition rules are to be retrospectively relaxed. With any luck, 
the situation of reliance on the invalidity of a divorce, without a 
declaration from the court, would be rare and unlikely to cause too 
much difficulty. Perhaps the number of persons relying on the validity
of a foreign divorce in these circumstances would be greater than that of persons relying on the invalidity of divorce. It is possible that newcomers to England, who had no conception of English law, may never have considered that the divorces, which they obtained abroad, would be invalid in England, and may never have questioned their validity. The advantage of recognition and minimisation of existing limping marriages would seem to outweigh the potential confusion of reliance on the invalidity of a divorce.

j. Who Could Satisfy the Test?

Certainly a wife petitioner could satisfy the test, as that was the situation in Indyka itself. But the Indyka case was extended in this respect in subsequent decisions.

In Mayfield v Mayfield it was held that a foreign divorce should be recognized on the principle of Indyka, even though it was the husband who obtained the divorce. Simon P. said the material fact was that the decree changed the status of the respondent wife, who had a real and substantial connection with Germany (the foreign jurisdiction in question), and should be recognized as such, in relation to both the husband and the wife.

Mr. Justice Cumming-Bruce, in Blair v Blair, seemed to be of the opinion that it was necessary for the petitioner (whether he was male or female) to have a real and substantial connection with the law district or country in question. In the latter case, an Englishman married a Norwegian and acquired a Norwegian domicile of choice. Shortly after he lost his Norwegian domicile of choice, the husband petitioned for divorce in Norway. There was no doubt that the respondent wife had a real and substantial connection with Norway, for she was a national and domiciliary
of that country at all material times. Yet Cumming-Bruce J. went into
some factual detail to establish the husband's real and substantial
connection with Norway, taking into account such factors as: his marriage
to a Norwegian; establishment of the matrimonial home in Norway; acquisition
of a domicile of choice in Norway, and so on. Surely, if Cumming-Bruce J.
had felt that the connection of the respondent was sufficient he need not,
and would not, have gone to such lengths.

In *Munt v Munt* a divorce had been granted on the basis of domicile
and *bona fide* residence in Virginia for at least a year. The judge was
satisfied by expert evidence that the word "domicile", as used by the
foreign jurisdiction, was akin to a mere residential qualification.
Nevertheless, the divorce was recognized on the basis of the husband
petitioner's real and substantial connection.

There was no English case where a wife obtained a divorce which was
recognized on the basis of the husband respondent's "real and substantial
connection".

Obviously, it would have been preferable to have a properly defined
test, so that one could state with certainty who could satisfy the test,
be it husband, wife, respondent, petitioner, or any combination.

k. *Financial Protection*

One reason why the courts should have considered carefully before
extending the real and substantial connection test to the husband, or at
any rate the husband petitioner, was clearly pointed out by Lord Pearce
in *Indyka v Indyka*. He said:

"If he can by residing abroad for three years obtain a decree
which is recognized in this country it will terminate his
matrimonial obligations and debar his former wife from seeking
financial relief in our courts. Unless Parliament introduces some machinery for granting such relief while acknowledging the foreign severance of the marriage tie, I see no practical means of putting men and women on the same basis with regard to recognition of decrees."

The issue of financial protection for the wife after a foreign divorce, which is canvassed in the final part of this work, was raised in Turczak v Turczak.

The facts were that H and W, both Polish, were married in Poland in 1939. Two months later they were separated as a result of the war. At the end of World War II, H settled in England and W remained in Poland. In 1950 he wrote to W asking her to divorce him and she refused. In 1963 H decided to commence divorce proceedings in Poland and again asked W to divorce him, this time offering her a monetary consideration. She refused and H commenced divorce proceedings himself in Poland. He obtained a divorce in 1967 and in the same year, while the Polish action was on appeal, the wife issued a summons in England under s. 22 of the Matrimonial Causes Act 1965 alleging wilful neglect to maintain by the husband. Subsequently the Polish decree was made final.

It was held that the wording of s. 22 precluded any order where there was no subsisting marriage and, since the marriage had been validly dissolved by the Polish court, no order could be made.

Thus a wife in England was not able, and still is not able, to obtain maintenance from the English court after a valid foreign divorce.

Perhaps the facts of Turczak itself are not significant of the most deserving case for maintenance from the English court, since the wife had at all material times been a resident of Poland, and it could be contended that she ought to have looked to her own court for financial assistance if
possible. However, it is easy to conceive of a situation where a
deserving wife is resident in England and the husband obtains a divorce
abroad as a result of his "real and substantial connection." What
protection would the wife have in these circumstances? It seems that
the only solution would be timely action on the part of the wife to
issue a summons in England prior to any possible action in the foreign
court.

1. Capacity to remarry

A further problem arose as a result of the relaxed recognition
rules. It was possible that a divorce, recognized under the Indyka
test, and thus valid in England, would be ineffective to enable a party
to remarry. The reason for this was that capacity to remarry is generally
governed by the law of each party's antenuptial domicile, and the party
could have been under an incapacity to remarry by the law of his domicile.

This type of situation arose in *R v Brentwood Superintendent Registrar
of Marriages*, where an Italian national, domiciled in Switzerland, had
been married to, and divorced from, a Swiss national. He wished to remarry
a Spanish national, also domiciled in Switzerland.

Sachs L.J. refused to order the marriage certificate to be issued,
because the Italian was under an incapacity to remarry by the law of his
domicile. Under his domiciliary law, Swiss law, capacity to marry was
governed by the law of the nationality, in this case Italy. Since he did
d not have capacity to remarry by Italian law, he was unable to remarry in
Switzerland, and hence in England also.

The main justification given was that of comity between nations,
that England should not be too hasty to criticise other legal systems.
However worthy the reason of comity, it is an obviously undesirable state of affairs where a man is unmarried and yet not free to remarry. Indeed, it was argued in the Brentwood case that this restriction was penal; the first wife had already remarried in Switzerland. It is submitted that it is only fair that a divorce, if valid, ought to entitle its holder to remarry.

m. Conclusion

Indyka v Indyka opened the gates to recognition, but left the courts with insufficiently precise guidelines as to the scope of the new test. This uncertainty led to much litigation and inconsistency. In addition, the general phraseology employed by their Lordships in the Indyka case was such as to enable the courts to make ad hoc extensions to the new test, which could have lead to further anomalous decisions.

Together with the potential problems of financial protection and incapacity to remarry, the state of the recognition rules in England before the 1971 legislation were not such as would lead to a rational development of the law.
CHAPTER 5
CURRENT CANADIAN LAW

1. LEGISLATION

A draft convention proposing reform to the internal law of member states was adopted in 1968 at the Hague Convention on Recognition of Divorces and Legal Separations. Although Canada was a party to this convention, no steps have been taken up to the present time to give effect to these recommendations in Canada. In fact, there has been no substantial legislative alteration of the Canadian common law rules for recognition of foreign divorces. The only provisions for recognition in the Divorce Act are contained in sections 14 and 6(2).

As far as divorces obtained within Canada are concerned, s. 14 provides that a decree of divorce granted under the Act has legal effect throughout Canada.

The Divorce Act has some effect on the recognition of foreign decrees. Section 6(2) provides:

6(2) For all purposes of determining the marital status in Canada of any person and without limiting or restricting any existing rule of law applicable to the recognition of decrees of divorce granted otherwise than under this Act, recognition shall be given to a decree of divorce, granted after the first day of July 1968, under a law of a country or subdivision of a country other than Canada by a tribunal or other competent authority that had jurisdiction under that law to grant the decree, on the basis of domicile of the wife in that country or subdivision determined as if she were unmarried and, if she was a minor, as if she had attained her majority.

Hence s. 6(2) provides an additional ground for recognizing a foreign decree, if it was granted on the basis of domicile of the wife determined as if she were unmarried, i.e. on the basis of circumstances similar to
those in which Canadian Courts can now take jurisdiction pursuant to s. 6(1) and 5(1) of the Divorce Act.

Clearly this is no more than piecemeal legislation, and the first point to be made is the limited application of s. 6(2). If *Indyka v Indyka* is the law in Canada, a divorce granted on the basis of the wife's domicile will undoubtedly be recognized because of her real and substantial connection with the jurisdiction granting the decree. Thus, since *Indyka* seems to be gaining acceptance in Canada, it appears that s. 6(2) is largely redundant and this explains why the subsection has not been invoked to any significant extent.

The other major criticism is poor drafting, which leaves s. 6(2) open to several different interpretations.

The subsection applies "for all purposes of determining the marital status in Canada of any person." Potentially, the meaning of these words is extremely wide. Does "all purposes" include issues relating to marital status which arise in an action other than a matrimonial one, such as a succession case? Does "any person" include anyone in the world, even if they have no connection whatsoever with Canada, except that proceedings are continuing before a Canadian court in which their marital status has been brought into issue?

Section 6(2) states that "recognition shall be given" if the wife is domiciled in the law district granting the decree. Does this mean that the court has no discretion to refuse recognition if for example, recognition would be contrary to natural justice or if the decree was obtained by fraud as to jurisdiction? Possibly the words "...without limiting or restricting any existing rule of law applicable to the recognition of decrees of
divorce..." include the common law grounds for attacking a foreign divorce and the court would not be compelled to recognize an offensive decree.

Reference to divorces granted by a "tribunal or other competent authority" seems to indicate that recognition may be given to divorces which have not been pronounced in a court of law, and this is the same as the position at common law. However, the subsection refers to the granting of "decrees" of divorce. Can an extra-judicial divorce such as a Jewish 'gett', properly be included as a 'decree' of divorce within section 6(2)? It is submitted that there is no logical reason for the exclusion of religious or extra-judicial divorces from section 6(2), but to include such divorces as 'decrees' of divorce would be to strain the ordinary meaning of the word.

Recognition is to be given to a divorce of a foreign tribunal or other competent authority "that had jurisdiction under that law to grant the decree". Read in context "that law" clearly refers to the law of the foreign country in question. There seems to be no justification for this. It has long been held improper for the court of the forum to investigate the municipal or internal jurisdiction and procedure of the foreign court, provided that the court had jurisdiction in the international sense, (for example, by virtue of the parties' domicile in the foreign jurisdiction) and provided that the decree was not offensive to natural justice. It seems therefore, that s. 6(2) may contain an unprecedented additional requirement of internal competence, and that Canadian courts could, theoretically, be forced to give effect to internal or procedural defects and to refuse recognition on those grounds. If the divorce in question continued to have effect in the foreign jurisdiction, for example, because
the defect was not brought to the attention of the foreign court, it could result in a limping marriage.

Section 6(2) does not operate retrospectively, but applies only to decrees of divorce "granted after the first day of July 1968." Thus in MacNeill v MacNeill a divorce obtained in 1966 could not be recognized under s. 6(2). The aspects of a retroactive test have already been discussed in relation to the Indyka principle and it is submitted that, in the interests of minimisation of limping marriages, recognition rules ought to be retrospective.

In La Carte v La Carte the court considered the words "granted ... on the basis of domicile of the wife in that country or subdivision..." One of the problems arising from these phrases is whether s. 6(2) permits recognition of a divorce only when the foreign law permits a wife to acquire a separate domicile and when the foreign tribunal assumes jurisdiction as on that basis. Andrews J. felt that the better interpretation was that s. 6(2) permits recognition of a foreign divorce if it was granted in circumstances under which a Canadian court could have assumed jurisdiction had the same facts been before it.

In other words, the court was prepared to adopt a Robinson-Scott type interpretation of s. 6(2) - that it would be sufficient if facts existed which would have enabled a Canadian court to assume jurisdiction, and that the actual grounds of jurisdiction in the foreign court would be immaterial. It has since been held in Szabo v Szabo that s. 6(2) will be applied if the wife was domiciled within the foreign law district at the time of filing the petition, even though jurisdiction may not have been assumed on that basis and even though it was the husband who was the
petitioner in the foreign proceedings. No enquiry was made to determine whether or not the wife had capacity to acquire a separate domicile in the foreign country in question (Hungary) nor to determine whether or not the exact requirements which would have enabled a Canadian court to assume jurisdiction in similar circumstances were satisfied. In fact, the facts probably would not have justified the assumption of jurisdiction in Canada, since the Canadian Act required the petitioner to be domiciled in Canada. In the Szabo case the husband petitioner probably was not domiciled in Hungary at the time of filing the Hungarian petition.

Therefore, if Szabo is good law, it seems that a very liberal Robinson-Scott type of interpretation will be afforded to s. 6(2).

2. **THE COMMON LAW FROM 1967 ONWARDS**

By far the most crucial question is the applicability of the Indyka case in the Canadian context. In the cases to date the view had been taken that Indyka v Indyka was an "existing rule of law" within s. 6(2) at the time the Divorce Act came into force in 1968, since the speeches of their lordships' were released in 1967, although they were not reported until 1968. The courts have gone further than that, and in Bevington v Hewitson, for instance, it was said that, even if Indyka was not an existing rule of law in Canada in 1968, nothing in s. 6(2) prevents the Canadian courts from adopting further recognition rules. In other words, it is not a necessary implication from s. 6(2) that the recognition rules in existence when the Act came into force are now exhaustive.

In Powell v Cockburn the Supreme Court of Canada failed to take advantage of a good opportunity (albeit obiter) to examine the recognition
rules and either approve or disapprove of the *Indyka* case, or to formulate a new Canadian rule.

The facts were that D married H' in Ontario. H' convinced D to go to British Columbia and subsequently deserted her, taking most of her money. H' joined the United States army and took up United States citizenship in 1945. He lived in Michigan for a while and then in Ohio. In 1946-7 he obtained a divorce in Michigan. Under Michigan law in order to found jurisdiction, there had to be residence within the state for one year prior to filing the divorce petition. H' was probably not in fact resident in Michigan for a year preceding the petition and most of the grounds for divorce were false. In 1951 D married P and sometime later obtained a judgment for alimony. P brought an action to set aside the alimony order on the grounds that D was validly married at the time of the second marriage. At issue, was the validity of the Michigan divorce.

Cromarty J. at first instance seemed to be confused by the question of presumptions. He said that there was a presumption in favour of validity of the marriage between P and D, but that once P proved the prior marriage there was a presumption in favour of its validity. The learned judge stated that, when D proved the foreign divorce, a presumption arose as to its validity also, and that the onus was on P to prove the foreign decree was invalid.

With the greatest respect, this writer knows of no "presumption of validity" of a foreign divorce. The onus is normally on the person asserting the divorce to prove its validity by satisfying the evidentiary requirements as to domicile or real and substantial connection with the foreign law.
district in question.

The court at first instance also found that the evidence did not establish that H' had changed his domicile from Ontario to Michigan and therefore, the divorce was invalid. This indicates that Cromarty J. was of the opinion that the domicile rule was still the only test for recognition. The court further held that, even if H' had changed his domicile to Michigan, he had perpetrated a fraud going to the jurisdiction of the Michigan court and also as to the grounds of divorce. Since the jurisdiction of the Michigan court was not established a substantial injustice occurred in granting the decree. Surely, though, if H' had acquired a Michigan domicile, the Michigan court would have had jurisdiction in the international sense and, thus, no substantial injustice would have occurred.

In any event, at first instance, the Michigan divorce was not recognized, P and D were found not to be validly married and the alimony judgment was set aside. D appealed.

The Ontario Court of Appeal also implied that domicile was still the test for recognition in Ontario when Schroeder J. A. said "In order to determine...(recognition)...the trial judge had to consider domicile."

The court found, that the evidence did not justify a finding that H' had not abandoned his domicile of origin and acquired a domicile in Michigan, or that he had not resided in Michigan for the statutory period of one year prior to the proceedings. The evidence required to overcome the presumption of validity of the second marriage was found insufficiently cogent and convincing in character, and the appeal was allowed.
It is submitted that the basis of Schroeder J.A.'s decision was incorrect. While it is true that the onus was on P to prove his case, the onus of proving change of domicile is very heavy and rests on the party alleging the change. Therefore, in this case the onus should have been placed on D, which may have led to a different result.

Nevertheless, it is submitted that the decision of the Court of Appeal provided the more equitable outcome since, originally, P must have believed that he and D were validly married. D had been badly treated by H' and no real injustice would have occurred in recognizing the decree which H' obtained.

However, the Supreme Court of Canada reversed the decision of the Court of Appeal and refused to recognize the decree, on account of the fraud perpetrated by H' which went to the jurisdiction of the Michigan court.

The defendant wife also pleaded that domicile was not the sole test for jurisdiction, but the comments of the Supreme Court of Canada in respect of the Indyka test were cryptic to say the least. Dickson J. said that the Indyka case was interpreted correctly in Cheshire's Private International Law so that:

1. Le Mesurier was no longer good law insofar as it was a sole basis of jurisdiction, and
2. English courts should recognize a divorce granted on the basis of a real and substantial connection.

The court went on to say that, before deciding whether the real and substantial connection test should be adopted in Canada, it would first settle the question of fraud; if the divorce was attacked successfully, further consideration of "real and substantial connection" would be
unnecessary. In the result there was no further consideration of the Indyka principle. It is submitted that it was highly desirable for the highest court in Canada to speak out on the question of recognition of foreign divorces, because, until it does, the future of Indyka in Canada will never be certain. Thus, there is now two fold uncertainty in Canada, which could have been avoided by the Supreme Court: first, is Indyka the law in Canada; second, when is the Indyka test satisfied.

The court also said, if the sole test were domicile, there would be no need even to make a finding on the question of fraud, since the trial judge's finding of domicile in Ontario and not Michigan would conclude the matter against the first husband. It seems clear from this that domicile is no longer the only test, but what is the wider rule? Perhaps the fact that Indyka was mentioned at all is indicative that the Supreme Court of Canada would be willing to apply it. Certainly, the court missed an ideal opportunity to devise a new recognition test, if it did not approve of the rather uncertain principle laid out in Indyka. It is unfortunate, to say the least, that the lower courts are left to sort out the tangle of recognition of foreign divorces in Canada, virtually without a word of assistance from the highest court.

O'Sullivan J.A. (dissenting) in Holub v Holub was clearly of the opinion that it was wrong for Canadian courts to apply the decision of the House of Lords in Indyka until it is adopted by the Supreme Court of Canada. There is some merit in this argument, for the House of Lords is merely persuasive and not binding authority in Canada.

Interestingly, there are a number of decisions in which the Indyka case has either not been mentioned at all or not considered. In
Seagull v Seagull. the Ontario Court of Appeal refused to recognize a Michigan divorce, although the wife, who obtained the divorce, had satisfied Michigan jurisdictional requirements of residence for at least one year preceding the petition. Schroeder J.A. held that, since the first husband was domiciled in Ontario at the time of the divorce, and since the appellant wife could not at that time acquire separate domicile under Ontario law, the Michigan divorce was invalid, and the wife's second marriage null and void. The Indyka case was not mentioned, but it should be noted that this case was decided by the same judge who was overruled by the Supreme Court of Canada in the Powell v Cockburn case.

Similarly, in Re Jones and Re Reid v Reid, the Indyka case was not considered. The courts in these cases seemed to be more concerned with the application of the doctrine of preclusion, than with the recognition of foreign divorces per se, and the possible alternatives to the domicile test.

However, the Indyka test has been approved and applied by the lower courts both before and after the Powell v Cockburn case.

a. The Indyka Test as Applied in Canada

Generally, the test has been applied in the same way as it was in England.

A "real and substantial connection" has been held to exist on the basis of the wife's residence for most of her life in the country or state in which the decree was obtained. There appears to be no Canadian authority on whether the real and substantial connection test can be applied to a federal country.

The Manitoba Court of Appeal has held that six years' post-war
residence by the husband in Germany is sufficient to establish a real and substantial connection with that country. In *MacNeill v MacNeill* it was held that there was sufficient connection when the petitioner had been resident in Michigan, the state which granted the decree, for three years. However, it seems from *La Carte v La Carte* and *Wood v Wood* that residence of a year, or even less, would suffice.

In *Wood v Wood* the facts were that P and R were married in Alberta in 1967. P went to Utah in February 1969 and R followed shortly thereafter. P obtained a decree nisi of divorce from R in Utah in November 1969. P remained in the United States until 1971, but from September 1970 to January 1971 she was in Central America. R returned to Alberta from the United States in 1973. In the meantime they had both remarried, but nevertheless had resumed cohabitation together for ten weeks in 1973. P wished to divorce her second husband but had been advised that the Utah divorce, and thus her second marriage, were invalid by Canadian law. Therefore P petitioned for a divorce from R in Alberta.

Turcotte L.J.S.C. found that the Utah divorce should be recognized *inter alia* on the basis of residence in that state, since the husband and wife were living and working in Utah, and since no forum shopping was involved. This case seems to apply an earlier Alberta decision which followed the *Indyka* case, but in fact is authority for the proposition that a divorce may be recognized on the basis of "bona fide" residence i.e. - on the basis of any period of residence provided the spouse(s) are not resorting to the jurisdiction purely for the purpose of obtaining a divorce.

The *Wood* case can be contrasted with English case, *Davidson v*
Davidson, where residence of less than a year, without more, was said to be insufficient to show "substantial" connection with the state in question. Therefore, it may be that the Indyka case, at least in Alberta, is to be interpreted more liberally than it was in England.

In La Carte v La Carte the Supreme Court of British Columbia followed the Wood case. The court held that a real and substantial connection had been shown on the basis of the wife's residence in Florida. Andrews J. was satisfied that the wife had lived with her mother in Florida for at least fifteen months prior to the granting of the decree. In those circumstances the Florida divorce was recognized and the husband's petition for divorce in British Columbia dismissed.

The facts of both the La Carte and Wood case can be contrasted with the cases mentioned previously in which the Indyka test was not considered. In Seagull v Seagull the wife had been resident in Michigan for over a year before she obtained her divorce, in order to satisfy Michigan jurisdictional requirements. In Re Reid v Reid also, the husband obtained a divorce from the Michigan court. In the Reid case the only relevant fact disclosed was that the husband who obtained the divorce was "living" in Michigan at the time. Presumably, since no fraud was alleged in the case, the husband had satisfied similar residential requirements to those in the Seagull case. In both these cases the Michigan divorce was not recognized because of lack of Michigan domicile. Re Jones is a similar case which can also be contrasted with the decision in the MacNeill case. In Re Jones a Californian divorce was not recognized even though the wife had been resident in California for approximately three years before the final decree of divorce was granted.
Citizenship or nationality in the decreeing law district is clearly not essential for the application of the Indyka test, but it is, nevertheless, one of the factors to be considered in determining "real and substantial connection."

However, it seems unlikely that citizenship alone will suffice for recognition purposes. For instance, in Holub v Holub, Monnin J.A. stated:

"It has been settled law that the validity of a foreign divorce, in the eyes of Canadian courts, does not depend on the nationality or residence of the parties or on the country where the marriage was solemnized, but on whether it was granted by a court of competent jurisdiction. Was the husband domiciled in West Germany at the time of the decree or did he have a real and substantial connection with West Germany at that time, namely, February 1950? That was the only issue to be decided."

Furthermore, in Keresztessy v Keresztessy, which is discussed below, a Hungarian divorce was not recognized in Canada despite the fact that both parties retained their Hungarian nationality according to Hungarian law.

On the other hand, in La Carte v La Carte there is dictum to the effect that nationality or habitual residence would be sufficient for recognition.

As far as the relevant date for determining real and substantial connection is concerned, there are conflicting authorities. In Holub v Holub Monnin J.A. asked the question: "Was the husband domiciled in West Germany at the time of the decree or did he have a real and substantial connection with West Germany at that time...?" (Emphasis added)

Yet, in Keresztessy v Keresztessy Donohue J. said:

"I cannot find that the defendant established any real and substantial connection between him and Hungary at the time of the start of the divorce proceedings." (Emphasis added)
In any event, it seems that a past real and substantial connection will not suffice. In Keresztessy v Keresztessy the spouses, who were married in Hungary in 1944, left that country in 1956 for political reasons, and had lived in Canada ever since. Both parties had become Canadian citizens in 1962, although by Hungarian law they retained their Hungarian citizenship. They separated in 1972, and in 1974 the husband obtained a divorce from a court in Hungary. Clearly, there was sufficient connection with Hungary until 1956 at least. The implication is, therefore, that past connections which were not present at the time of divorce will not satisfy the Indyka test. No doubt, though, the opposite conclusion would have been reached had the wife still been living in Hungary in 1974.

However, the Keresztessy case can be criticized on other grounds. Donohue J. was clearly operating on the assumption that the parties were domiciled in Canada by 1974, although he did not explicitly say so. The possibility that the husband may have intended to return to Hungary, in the event of a change in the political climate, was not considered. Surely in these circumstances he may have lacked the necessary intention for acquisition of a domicile of choice in Canada.

Donohue J. also stated:

"I hold it to be a matter of public policy that an Ontario court should not countenance resort by one resident litigant to a foreign forum at the risk of prejudice to another resident litigant when an adequate remedy is available in our own court."68

The problem is, of course, that a mere resident of Canada has no remedy under the Divorce Act; the test for jurisdiction pursuant to s. 5(1) is domicile in Canada, plus "actual" and "ordinary" residence for a specified time.
A different approach was taken in somewhat similar circumstances in *Haut v Haut*. In that case P and R were born in Germany and married there in 1940. In 1953, after their separation, P came to Canada and settled in Toronto. In 1954 R joined him but lived with him for only two days. P obtained a divorce in Germany in 1965, on the basis of his German nationality, despite the fact that R had become a Canadian citizen and that neither P nor R appeared before the court in person. After the divorce, in the summer of 1965, P returned to Germany to live but changed his mind and returned to Canada after six weeks. Thereafter, P lived in Toronto except for one trip to Germany in 1967, during which he remarried, and a second trip in 1973, to visit his brother.

P was found not to have acquired a Canadian domicile prior to the granting of the German divorce despite his stated intention to "settle" in Canada in 1953. Thus, the German divorce was recognized in Canada on the basis of P's continued domicile there. It was also held that P's return to Germany for "important events" demonstrated a "real connection" with Germany at the "relevant times" despite his lengthy residence in Canada.

The main points of distinction between this case and *Keresztessy* appear to be: that the petitioner in *Haut* did not take out Canadian citizenship until after the German divorce; that he had been resident in Canada for ten years while the petitioner in *Keresztessy* had been here sixteen.

Probably, the most significant difference was that in *Haut* there was no evidence to suggest that the respondent felt aggrieved, whereas in *Keresztessy* the plaintiff most certainly was very aggrieved by the Hungarian divorce.

While it is true that a fair result was achieved in both cases, it
does seem highly undesirable that recognition of a foreign divorce may depend on whether or not the respondent contests its validity in Canada. This type of approach could produce a great deal of inconsistency in recognition cases. Perhaps a better rationalization would be to say that the divorce in Keresztesy was offensive to public policy, while the one in Haut was not.

b. *Indyka and the Rule in Armitage v A-G* combined?

There is no Canadian case which has applied *Mather v Mahoney*, where a Nevada divorce was recognized in England because of a real and substantial connection with a state which would recognize the decree, namely, Pennsylvania.

However, there is *obiter dictum* from the Ontario Provincial Court, which suggests that a divorce may not be recognized in Canada, on the basis of recognition in a law district with which there is a real and substantial connection, unless such a divorce is also recognized by the law of the domicile. Since recognition by the law of the domicile is, of course, the rule in *Armitage v A-G* itself, there would be no need to use *Indyka* in those circumstances.

In *Hassan v Hassan* the parties were Egyptian nationals and Moslems at the time of their marriage in Cairo. They emigrated to Canada in 1971 and acquired a domicile of choice in Canada at that time. The husband obtained an extra-judicial divorce at the Egyptian Consulate in Montreal in 1974. Fisher Prov. J. stated:

"...it is now necessary to consider the effect of the divorce obtained by this husband. The divorce was not granted by the domiciles of either of the parties and, in fact, was obtained on Canadian soil at the Egyptian consulate. Whatever its validity in Egypt, it can have no validity in
Canada unless it can fall within an exception to the rule that only decrees granted by the domicile can have any validity.

It was argued that the divorce should be recognized as coming from a jurisdiction, Egypt, where the parties have a "real and substantial connection"; according to cases such as *Indyka v Indyka*, [1969] 1 A.C. 33, [1967] 2 All E.R. 689, and *Rowland v Rowland* (1973), 13 R.F.L. 311, 2 O.R. (2d) 161, 42 D.L.R. (3d) 205. The parties are still Moslem but it seems clear from the expert witness's evidence that when the parties come here they cannot engage in polygamy and, in fact, having become domiciled here they are not free to marry more than once. As domicile rules with respect to validity of a marriage, as indicated by *Ali v Ali*, then it should also rule as to divorce and, if relief in the form of divorce is to be granted under these circumstances, it should not be granted by the Egyptian law but by our law. The result is that the divorce is not recognized by this court."

There are other interpretations which could be given to this passage.

1. that the *Mather v Mahoney* principle does not apply if the divorce is obtained in Canada.

2. that the *Mather v Mahoney* principle does not apply if the parties are domiciled in Canada.

3. that the decision represents a general disapproval of *Indyka* and, therefore, does not have any bearing on the application of the *Mather v Mahoney* principle.

4. that the parties did not have a real and substantial connection with Egypt.

c. **Who May Satisfy The Test?**

The Canadian interpretation is that either party, whether husband, wife, petitioner or respondent, can satisfy the test. Thus, the same problem exists in Canada as in England, namely, that of ensuring financial
protection for a spouse, particularly the wife, after a valid foreign divorce has been obtained by the husband. This problem will be discussed more fully in a later chapter, together with the American solution.

d. Retroactivity and Capacity to Remarry

The Indyka test is certainly retroactive in the Canadian context, and in Bevington v Hewitson, for example, a divorce was recognized which had been granted in 1954. For reasons given previously, this seems reasonable.

The problem of capacity to remarry has apparently not arisen in Canada to date, but has already been discussed in the English context. The difficulty would arise when a foreign divorce is recognized under the Indyka test, but one of the former spouses is under an incapacity to remarry according to the law of his or her antenuptial domicile. Should recognition (under the Indyka test) automatically give the spouses capacity to remarry? Should the rule that capacity is to be determined by the law of each party's antenuptial domicile prevail?

As submitted previously, the equitable solution should govern this type of situation, and it is only fair that the holder of a valid foreign divorce should be entitled to remarry.

Nevertheless, it should be pointed out that this solution involves an encroachment on the conflicts rules for determining the validity of marriage, and it is conceivable that a limping marriage may result. If a person is allowed to remarry, and the marriage is invalid, for lack of capacity, by the law of his domicile, the marriage is then valid in Canada and invalid in the country of his domicile.
On the other hand, it is arguable that this type of situation would arise in any event. If the person were not allowed to remarry in Canada, he may return to the country where he obtained the divorce or some other country, and become validly married by the law of that country; thus, the limping marriage would be created anyway, and perhaps the problem lies with the restrictive rules of the country which puts him under an incapacity.

What remains now of the domicile test, *Armitage v A-G* and *Travers v Holley*? Certainly, domicile and the rule in *Armitage v A-G* continue to be grounds for recognition in Canada. But now that divorce jurisdiction is founded on federal or national domicile, it is conceivable that the recognition tests would apply if a national or federal domicile is established abroad. However, the courts seem to have decided otherwise, and the domicile test and the rule in *Armitage v A-G* remain unchanged in this respect.

While there is considerable overlap between the domicile test and the real and substantial connection test, there is perhaps very little overlap between the latter and the rule in *Armitage v A-G*. For example, in *Viccari v Viccari* a Mexican divorce, which was recognized in the state of the domicile, New York, was recognized in Canada, even though it was clear that resort had been made to the jurisdiction purely for the purpose of obtaining a divorce, and that there was no real connection with Mexico.

The sole distinction between this case and *Mountbatten v Mountbatten* is that, in the *Viccari* case, the husband was domiciled in New York, whereas in *Mountbatten* the wife (who lacked capacity to acquire a separate domicile at that time) had been a resident of New York for four years.
The Viccari case also conflicts with other decisions which indicate that in order to be afforded recognition a divorce must be a "genuine divorce".

The Viccari case can be further contrasted with the decision of the Supreme Court of New South Wales in El Oueik v El Oueik where it was held, inter alia, that a Lebanese divorce should not be recognized. The husband who was an Australian citizen and domiciliary resorted to the Moslem Court in the Lebanon purely in order to procure a divorce and avoid his responsibilities towards his wife. In these circumstances the court held that it would be manifestly contrary to public policy to recognize the decree and refused recognition under s. 104(4)(b) of the Family Law Act 1975.

One question which does not yet appear to have been answered is: now that a wife can acquire her own separate domicile for divorce purposes under s. 6(1) of the Divorce Act, is the rule in Armitage v A-G applicable to the wife's domicile as well as the husband's? Is it sufficient for recognition that the divorce would be recognized in the country of the wife's domicile, even if the divorce would not be recognized in the country of the husband's domicile (and vice versa)? Does s. 6(2) extend the Armitage rule for recognition as well as the domicile test? It has been said that s. 6(2) does not prevent further development of judge made law, and it would seem illogical if recognition by the husband's domicile were a ground for recognition in Canada, but recognition by the wife's domicile were not.

However, a different view could be taken. In England the statutory provision relating to the common law requires that the divorce be obtained in the domicile of one spouse and recognized in the domicile of the other,
or recognized in the domicile of each spouse.

As mentioned previously, it is not entirely certain whether *Travers v Holley* is applicable in all or any of the provinces in Canada. The rule was introduced to alleviate the potential hardship caused to a wife as a result of her domicile of dependence on her husband, but the only application of the rule, prior to 1968, was in respect of divorces granted in circumstances similar to those contemplated by the Divorce Jurisdiction Act 1930. That Act was abolished by the Divorce Act and presumably s. 6(2) itself was intended to cover situations of similar jurisdiction which arise under the Divorce Act since 1968.

In *Bevington v Hewitson* Lacourciere J. said that Parliament in enacting s. 6(2) did not mean to abrogate the rule in *Travers v Holley*. The learned judge considered the application of the doctrine and was of the opinion that:

1. *Travers v Holley* could be applied to divorces granted prior to 1968, in circumstances similar to those contemplated by the Divorce Jurisdiction Act;

2. The fact that s. 6(2) related only to divorces granted after July 1, 1968, did not inhibit the use of s. 6(1) (which provides for a separate domicile for the wife for divorce purposes) in the *Travers v Holley* context, in relation to decrees granted prior to that date.

This second application of *Travers v Holley* would be useful if it were ultimately held that *Indyka* is not the law in Canada, because then s. 6(2) would be applicable to divorces obtained after 1968, and *Travers v Holley* to similar divorce decrees obtained prior to that date. This would tend to minimise existing limping marriages and lead to fewer anomalies.
in recognition cases.

However, Lacourciere J. did not apply the doctrine in the instant case. The husband was domiciled in Ontario, but the wife would certainly have been domiciled within the decreeing jurisdiction (Maine) within the meaning of s. 6(1), and would have satisfied the requirements of s. 5(1) of the Canadian Divorce Act.

The reason given by Lacourciere J. was:

"But I do not consider that s. 6(1) can be so applied to the facts of this case. For the subsequent marriage, as I have stated, took place in 1958, and the question before me is whether, at that point of time, the husband was, by the law of Ontario, free to remarry. And it is obvious that had this question been asked the Ontario courts at that time, reference to s. 6(1) would not have been possible."

Does this mean that recognition of the divorce was "incidental" or subordinate to the question of capacity to remarry? This could not have been what Lacourciere J. had in mind, because he proceeded to recognize the divorce on the basis of a real and substantial connection. The court did not deal with the real problem before it, which was: which rule is to govern when two conflicting rules of private international law are involved? By the law of his domicile, Ontario, the husband lacked capacity to remarry at the time of the ceremony, but by the conflict rules for recognition of divorces (Travers v Holley and Indyka) the divorce which the first wife obtained from the husband was valid. Should recognition rules retroactively affect the conflicts rules for capacity to remarry? As mentioned above, probably the best solution to this type of problem would be to apply the rule which gives the more equitable result.

Did Lacourciere J. mean that Travers v Holley should be retroactive only when there is no "intervening" act, such as a subsequent marriage by one
of the parties? If so, why is the same reasoning not applicable to the Indyka test also? In any event, the "intervening" act as a reason for non-retroactivity was advanced in relation to an act which relied on the invalidity of a divorce, not its validity.

There seems to be no logical reason why the Travers v Holley doctrine, if it is retroactive as regards s. 6(1), should not have been applied in the Bevington v Hewitson case. Yet Lacourciere J. appears to have preferred to interpret and apply the connection test.

It is submitted that if the Indyka principle is the law in Canada then it follows that Travers v Holley should also be the law, since the former stems from the latter. However, it is likely that most situations of similar jurisdiction would involve a "real and substantial connection". Thus, if the Indyka principle continues to be applied in Canada, Travers v Holley, as well as s. 6(2) itself, will be largely redundant. Indeed, it may be that as a result of Indyka that similar jurisdiction is merely an element of "real and substantial connection", in which case the Travers v Holley principle would be wholly redundant.

f. Extra-Judicial Divorces

The Canadian position with regard to extra-judicial divorces is not altogether clear. In Schwebel v Ungar a "gett" pronounced in Italy and recognized in Israel, where the parties subsequently acquired a domicile, was recognized in Canada. However, this decision has also been explained in terms of the incidental question, the recognition of the divorce merely being incidental to the primary question of capacity to remarry by the law of the domicile.

In Khan v Khan Manson J. considered a Muslim marriage which took
place in Washington and a Talaknama (a type of informal divorce) which took place thereafter. He said: "... I am satisfied that if the marriage was valid the bill of divorcement was also valid."

In Goldenburg v Triffon it was held that a Jewish religious divorce should be recognized in Quebec since it was granted by the law of the parties' domicile at the date of commencement of proceedings, even if the parties were domiciled in Quebec by the time the divorce was finalized.

On the other hand, where the parties are domiciled in Canada the extra-judicial divorce is pronounced here, it has been held that the divorce should not be recognized.

Thus, it seems that extra-judicial divorces may be afforded the same treatment as any other divorce, which is only consistent with the principle of comity between nations.

3. DO THE CANADIAN RULES MEET THE OBJECTIVES OF THIS PART?

a. Prevention of Limping Marriages

The common law before 1967 was very narrow in application, which did not and does not serve to minimize the creation of limping marriages. Certainly s. 6(2), taken on its own, is subject to the same criticism. If the Robinson-Scott type of interpretation were not used in conjunction with the subsection, then its area of application would be even smaller, because it would apply only to divorces granted specifically on the basis of domicile of the wife in the granting jurisdiction. Section 6(2) is not retroactive, which will not tend to minimise existing limping marriages; but the use of Travers v Holley, in order to make the subsection effectively retroactive, may solve this problem.
If *Indyka* is the law in Canada this objective will probably be satisfied. The test is retroactive, which helps; but, as explained above, there is a possibility that a limping marriage may be created, if one of the parties is under an incapacity to remarry by the law of his domicile.

b. **Prevention of Hardship and Anomalies**

The various possible interpretations of s. 6(2), outlined above, could lead to any number of anomalous decisions, but the subsection appears to have been applied only once, even though reference is supposed to be made to this subsection before *Indyka*. By virtue of its limited application, it is unlikely that there will be many decisions involving s. 6(2), let alone anomalous decisions.

The effect of s. 6 on the rule in *Armitage v A-G* is as yet uncertain, which could lead to anomalies between provinces.

The *Indyka* test could lead to both hardship and anomalies. A wife could be deprived of her claim to financial support from her husband, if the husband can unilaterally obtain a recognized divorce in a country with which he has a "real and substantial connection." If, by the law of his or her domicile, one ex-spouse is under an incapacity to remarry, but the other ex-spouse, by the law of his or her respective domicile, is not, then the second-mentioned person can remarry, whereas the first probably cannot.

The *Indyka* test may also be interpreted differently from province to province; for instance, in Alberta the test has been interpreted very liberally, to mean residence for any period of time, provided the parties were not forum shopping. It is very possible that the same interpretation may not be given in all provinces.
c. Clarity and Certainty of Application

The usual criticisms of the domicile test are applicable to s. 6(2), but the poor drafting in s. 6(2) adds greatly to the lack of clarity and certainty in its application.

Of course, vagueness and uncertainty have been major criticisms of the Indyka test in the past. This is evidenced by ad hoc extensions to the rule and increased litigation in this field. It is not clear whether Indyka can be combined with the rule in Armitage v A-G, or applied to a federal country such as the United States as a whole. In addition it is not even certain whether Indyka is the law in Canada.

The Canadian position with regard to extra-judicial divorces is also unclear.

d. Prevention of Forum Shopping

As stated at the outset, it is necessary to balance this objective with the conflicting objective of preventing limping marriages. The Indyka test itself, at least up to now, does not seem to have led to recognition of a divorce which ought not to have been recognized.

Perhaps forum shopping may be prevented, not only by the recognition rules themselves, but also by use of a public policy ground for refusing recognition of a foreign divorce as, for example, in the Australian case of El Oueik v El Oueik and the case of Keresztessy v Keresztessy.

e. Requirement of a Real Connection

This objective is satisfied if Indyka is the law in Canada. If it is not the law, there may be instances where a divorce is not recognized,
even though there is a reasonable degree of connection with the foreign jurisdiction. In fact, such instances have already occurred.

The domicile test could lead to recognition of a divorce when there is no real connection with the decreeing jurisdiction, because of the technical refinements of the concept. Proposals for change in the concept of domicile (for the purposes of the Divorce Act) have been made in Part 1 of the thesis, and these would be helpful to ensure a real connection with the decreeing jurisdiction.

The rule in *Armitage v A-G* can also lead to recognition when there is no real connection. But if there is a real connection with the country of domicile, and that country recognizes the decree, there seems to be little justification for refusing recognition in Canada.

4. **SUMMARY ON RECOGNITION**

The Canadian position resembles the English common law between 1967-71, with the added confusion and uncertainties of s. 6(2) of the Divorce Act and lack of authority from the Supreme Court of Canada. The rules do not meet the suggested criteria and it is submitted that the state of the recognition laws in Canada, although well-intended, is unbearably uncertain. The rules should be more clearly defined, so that lawyers may advise their clients on the validity of a foreign divorce without the necessity of litigation.

The solutions provided by the English Recognition of Divorces and Legal Separations Act 1971 will be considered in the next chapter, followed by recommendations for reform in Canada.
5. **GROUNDS FOR ATTACKING A FOREIGN DIVORCE**

The grounds for non-recognition of foreign divorces in Canada and England are very similar, the former having been influenced by the latter to a great extent. Therefore, this analysis is of the common law position generally.

a. **Fraud**

(i) It would appear that the fact that a fraud was committed in the foreign proceedings is not of itself a sufficient ground for refusing recognition at common law. In some of the older Canadian cases the view was that fraud of any kind would suffice, but it seems clear from the decision in *Powell v Cockburn* that this is not the case. Thus, a fraud going to the merits of the foreign petition is not generally a ground of attack, even if something is withheld which would have made the foreign court come to a different conclusion.

However, it seems that if the fraud which is perpetrated results in a "substantial injustice" in granting the foreign decree, then recognition may be denied. Substantial injustice as a ground for refusing recognition is examined below.

(ii) **Fraud as to jurisdiction**

If a fraud is perpetrated on the foreign court which goes to the very root of the action, namely, the jurisdiction of the court in the international sense, the decree may not be recognized at common law. The most clear example of this type of fraud is presented by *Bonaparte v Bonaparte*. In that case a husband petitioner, having been unsuccessful in England, set up a false residence in Scotland and obtained a divorce there on the basis of his domicile in Scotland. Thus, the divorce was not recognized in
England because of the fraud as to Scottish domicile.

More recently, in *Powell v Cockburn*, the Supreme Court of Canada summarized the law in the following way:

"The grounds upon which a decree of divorce granted by one state can be impeached in another state are, properly, few in number. The weight of authority seems to recognize, however, that if the granting state takes jurisdiction on the basis of facts which, if the truth were known, would not give it jurisdiction, the decree may be set aside. Fraud going to the merits may be just as distasteful as fraud going to jurisdiction, but for reasons of comity and practical difficulties, in the past we have refused to inquire into the former. Even within the limited area of what might be termed jurisdictional fraud there should be great reluctance to make a finding of fraud for obvious reasons."

A distinction must be drawn here between fraud as to jurisdiction in the international sense and fraud as to the internal jurisdictional requirements of the foreign court. Lord Lindley, M.R. in *Pemberton v Hughes* made the point in the following way:

"...Where no substantial justice, according to English notions, is offended, all that English Courts look to is the finality of the judgment and the jurisdiction of the court, in this sense and to this extent – namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the court had jurisdiction in this sense and to this extent, the courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed... But the jurisdiction which alone is important in these matters is the competence of the Court in an international sense – i.e., its territorial competence over the subject matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the Courts of this country..."

Thus, it is submitted that if, in fact, the petitioner was domiciled in the foreign jurisdiction concerned, in the Canadian or English sense, then fraud as to the internal jurisdictional requirements of the foreign
country should be irrelevant at common law, unless it causes a substantial injustice. However, it should be noted that this was apparently not the view taken in Powell v Cockburn. The view in that case, as shown in the quotation above, seems to be that such fraud would be sufficient cause to refuse recognition.

A further problem would arise in this context with respect to the rule in Armitage v A-G. What if, as in Middleton v Middleton, there was in fact no domicile in the decreeing jurisdiction, and there was fraud as to the internal jurisdictional requirements of the foreign court, but the decree is nevertheless recognized in the country of the spouses' domicile? It is submitted that the preferable solution would be to give effect to the rule in Armitage v A-G, unless a "substantial injustice" occurred in granting the decree.

If adopted, the net effect of this reasoning would seem to be that the ground of fraud as to jurisdiction of the foreign court would only be a separate ground of attack when the foreign country uses similar divorce jurisdiction rules to those in the country where recognition is sought. When there is fraud as to internal jurisdictional requirements which do not resemble the requirements in the forum, the ground for non-recognition would be, in effect, "substantial injustice", if the decree would otherwise satisfy Canadian or English recognition tests. If such a decree would not otherwise satisfy Canadian or English recognition tests, it would not be recognized in any event.

b. Natural Justice

A decree may be refused recognition if it is contrary to natural justice as a result of some defect in the foreign proceedings. The
most common instance of non-recognition on this ground is when the defendant has no notice of the foreign proceedings and, thus, no opportunity to appear and defend the petition. This is especially the case when the lack of notice is a result of the petitioner's fraudulent concealment of the defendant's whereabouts. In addition, it seems that the objection to lack of notice can not be waived by the defendant because this would have the effect of allowing that person to determine his or her own status.

But lack of notice of the foreign proceedings is not contrary to natural justice if, in fact, the defendant knew that the proceedings were taking place. Dicey and Morris also suggests that a defendant cannot allege want of notice if he is resident in the foreign country when the proceedings are commenced. But in *Bavin v Bavin* the Ontario Court of Appeal refused to recognize a Mexican divorce, when lack of notice was a result of the petitioner's fraud as to the whereabouts of his wife, even though both husband and wife were domiciled and resident in Mexico at the time.

Furthermore, it seems that a foreign decree is not offensive to natural justice if want of notice occurs because the foreign country has used its own rules for substituted service or dispensing with service.

c. **Substantial Injustice**

"Natural" justice and "substantial" justice are sometimes used synonymously. But the notion of substantial justice seems to have a much wider ambit than the necessity of notice and opportunity to be heard. It seems to be analogous to public policy and in *Middleton*
v Middleton Cairns J. stated: "...What strikes an English judge as being fundamentally unfair is contrary to substantial justice." Thus a foreign decree may not be recognized at common law if a substantial injustice occurred in granting it. A substantial injustice usually occurs where there has been serious fraud in the foreign proceedings - for example, fraud leading to the concealment of the wife's whereabouts so that she receives no notice of the foreign proceedings. In Middleton v Middleton an Illinois divorce was held to be contrary to substantial justice when the husband's case in the foreign court was wholly fraudulent. He had not satisfied the internal jurisdictional requirements of residence in Illinois for at least a year; he had lied about his wife's residence with him in Illinois and falsely alleged that she had deserted him.

Therefore, although fraud per se is an insufficient ground for refusing recognition, unless it goes to jurisdiction, it may amount to a substantial injustice in certain circumstances.

d. Other Grounds

With the exception of the grounds of attack mentioned above, the courts are not generally concerned with the propriety of the foreign proceedings. The substantive grounds on which the divorce is obtained are irrelevant. The fact that a mistake was made by the foreign court is insufficient to justify non-recognition.

Nevertheless, the fact that a decree was obtained by duress may be a ground to refuse recognition at common law. In Meyer v Meyer, an English case, a German divorce was obtained by the wife of a Jew during the Second World War at the instance of the Nazis. It was held that the decree was obtained by duress, there being a continuing danger to the life,
limb and liberty of the wife, if she remained married to the husband. The court then refused to recognize the decree.

The Meyer case can be contrasted with Igra v Igra. In the latter case also, the wife obtained a German divorce from her Jewish husband at the instance of the Gestapo. That divorce was recognized in England. The distinction between the two cases seems to be that in Igra v Igra the wife was living with another man at the time of the German divorce and, therefore, that the wife was not really subjected to duress.

Collusion between the spouses has been suggested as a ground for refusing recognition. However, it seems that it is only where the collusion is combined with fraud that recognition may be refused: as for example, in Bonaparte v Bonaparte, where there was fraud and collusion going to jurisdiction of the foreign court. Presumably, fraud and collusion could also amount to a "substantial injustice" in certain circumstances.

In Hornett v Hornett it was said that the paramount consideration for recognition and refusing recognition should be the justice or injustice of the case. On the face of it this sounds reasonable, and comparable with the "substantial" and "natural" injustice grounds. However, in the Hornett case Cumming Bruce J. took account of events occurring after the French divorce decree had been pronounced in order to determine the justice of the case. It is submitted that the learned judge was clearly wrong to do so. For this means that the validity or invalidity of the divorce (and thus the status of the parties) could be altered by events taking place after the divorce has been granted. The criterion ought to be whether there was substantial justice or injustice in granting the decree. Events taking place
after the decree was pronounced ought to be irrelevant.

A further ground of non-recognition was suggested by two of their Lordships in Indyka v Indyka, namely, where there is no "genuine" divorce. In other words, it was felt that the decrees of countries which sell or purvey divorces should not be afforded recognition in England. However, it is submitted that their Lordships did not intend that all divorces obtained in such countries should be refused recognition. For in that case, even domiciliaries of these nations would not be able to obtain a valid divorce. The preferable view would seem to be that a divorce may be refused recognition in appropriate circumstances where it was obtained by means of forum shopping. In effect this would be an extension of the "substantial justice" or public policy ground for non-recognition. In fact, in the relatively recent case of Keresztessy v Keresztessy a divorce was refused recognition on public policy grounds where both parties were Ontario residents and the husband had resorted to Hungary to procure a divorce.

e. Summary

There is a considerable overlap between the various grounds of attack. "Substantial justice" in the wider sense seems to cover most situations, such as: gross fraud, duress, lack of notice, and probably fraud as to jurisdiction. Thus, the same results could probably be achieved by use of a general "substantial injustice" or public policy exception. Nevertheless, it does seem that the common law grounds for refusing recognition on the whole lead to a fair result.

A study will also be made of the statutory exceptions to recognition
under s. 8 of the English Recognition of Divorces and Legal Separation Act 1971. The recommendations at the end of this part will include a proposal for grounds of attack of foreign divorces, based on the findings of the common law and statutory studies.
CHAPTER 6

THE RECOGNITION OF DIVORCES AND LEGAL SEPARATIONS ACT

The English Act, although based on the Hague Convention, represents the most simple and clear set of recognition tests. The complexities of the 1968 Convention and, similarly, of the recently enacted Australian provisions, seem unjustified and it is submitted that little would be gained, for present purposes, from detailed criticism of these provisions. For this reason the writer has chosen to study the English Recognition Act of 1971 as a potential model for Canadian divorce reform in preference to the Hague's recommendations and the Australian law.

1. DIVORCES GRANTED IN THE BRITISH ISLES

These will be recognized in the United Kingdom, subject to s. 8 of the Act, if they were granted under the law of any part of the British Isles. This corresponds with the current Canadian position under the Divorce Act, whereby divorces granted under that Act are to be recognized throughout Canada.

However, in England there has been some concern about the recognition of extra-judicial divorces obtained in England, and this aspect of recognition will be discussed under that heading.

2. RECOGNITION OF OVERSEAS DIVORCES

Section 2 defines "overseas divorces" as those which "have been obtained by means of judicial or other proceedings in any country outside the British Isles," and which are effective under the law of that country. Subject to s. 8 of the Act, which is considered below, an overseas divorce will be recognized in England if, either spouse was a national of or, habitually resident in, the country which granted the
decree, at the date of institution of the proceedings.

(a) Habitual Residence

The concept of habitual residence has already been discussed in relation to Part 1 of the thesis. However, some comment is necessary on the habitual residence provisions in relation to recognition.

If the issue concerns a federal country, then for the purposes of habitual residence, each territory is to be considered a separate country. For example, it would not be sufficient for recognition to prove habitual residence in the United States or Canada; habitual residence in the state or province where the divorce was obtained must be proved.

Furthermore, section 3(2) of the 1971 Act provides:

3.(2) In relation to a country the law of which uses the concept of domicile as a ground of jurisdiction in matters of divorce or legal separation, subsection (1)(a) of this section shall have effect as if the references to habitual residence included a reference to domicile within the meaning of that law.

The phraseology employed in this subsection is somewhat obscure. Do the words "as if the reference to habitual residence included a reference to domicile" mean that, in order for a divorce to be recognized, the person must be domiciled and habitually resident in the country in question, or merely domiciled or habitually resident in that country? It seems that domicile within the meaning of the law of the foreign country is intended to be sufficient. Thus a foreign divorce based on federal domicile would be recognized in England. S.3(2) undoubtedly serves to minimize limping marriages. Nevertheless, it is submitted that this type of provision could permit forum shopping at an unacceptable level and could result in recognition of overseas divorces where there is no real connection with the decreeing
jurisdiction. To take an extreme example, if in country X domicile meant three days physical presence and H obtained a valid divorce there after a week's residence, that divorce, presumably, would have to be recognized in England under the combination of s.3(2) and s.3(1)(b).

(b) **Nationality**

The nationality concept as a connecting factor has been considered in relation to divorce jurisdiction in Part 1.

With regard to recognition, a "country" for the purposes of the nationality test, unlike the habitual residence test, means a federal country, such as the United States, and not each individual territory or state. Thus, *prima facie*, a divorce granted anywhere in the United States, even a state with which there is only the most tenuous connection, will be recognized in England if the petitioner or respondent was a United States citizen.

Obviously, the nationality test could encourage forum shopping, and result in recognition of a foreign divorce where there is no longer a sufficient connection between the parties and the country of nationality. This type of situation arose in *Torok v Torok*, where H and W were Hungarians who went to England in 1956 and married in Scotland in 1957. In 1964, H went to Canada leaving W and children. After that time there was no cohabitation between the parties and neither of them had returned to Hungary since 1956. Under Hungarian law they retained Hungarian nationality despite their British citizenship. In 1972 W received a summons from a court in Hungary notifying her of divorce proceedings. Steps were taken to adjourn the proceedings and, eventually, the wife entered an appearance, cross-petitioned and a "partial" decree was
ordered. The wife appealed and, in the meantime, began divorce proceedings in England and asked to have the English decree absolute expedited.

There was no doubt that the Hungarian decree, when it became final, would be recognized in England by virtue of the nationality provision in s. 3(1)(b) of the 1971 Act, even though this was a case of dual nationality. The wife's concern was that the Hungarian courts rarely awarded maintenance and that she would not be eligible for maintenance in England after the foreign decree was pronounced. In addition, the Hungarian court had no jurisdiction over the matrimonial property, namely the house, which was in joint names and situated in England. In order to avoid these problems, the English court was forced into the intolerable position of expediting the English decree, so that the Hungarian decree would be ineffective when it became absolute.

From this case and the Canadian case, Keresztessy v Keresztessy, it is apparent that the nationality principle may result in undesirable foreign interference.

Furthermore, it is difficult to see why, after all this time, English law should begin to favour the nationality test. And it is ironic, to say the least, that at the same time the nationality test is dwindling in popularity in the civil law countries. For instance, De Winter has said:

"Application of the national law to the personal status of a person who no longer has any social ties with his native country is a rather pointless judicial construction contrary in my view to the social function of Private Law and, consequently, yielding unsatisfactory results. For this social function is to ensure the application of standards regarding the personal rights, capacity and status of persons, which are in accordance with the interests and the legal concepts of the community of which they form part."
Moreover, the nationality principle is difficult to apply to federal countries. The solution provided by the 1971 Recognition Act may be far from satisfactory. The requirements for recognition of an American divorce under the nationality test are: (1) that one of the spouses was a United States national at the time divorce proceedings were instituted, and (2) that the divorce is effective under that law.

Difficulties may arise if, for example, both the spouses are United States residents, and H obtains a divorce in Nevada, which is "effective" under the law of Nevada, although H is not a habitual resident of that state. However, the state of the wife's residence does not recognize the divorce and, thus, the divorce is not effective under the law of Pennsylvania. Can the divorce then be regarded as valid or "effective" under the national law i.e. the law of the United States?

It is submitted that an appropriate residence test and a domicile test (if the proposed amendments to the domicile concept are adopted) would be sufficient in the recognition context and that a nationality test is unwarranted.

(c) The Common Law

The 1971 Act prevents further development of judge made law and abolishes the Indyka test and Travers v Holley. But the grounds of recognition are not really narrowed by this in view of the width of the statutory tests.

By s. 6(5) the domicile test and the rule in Armitage v A-G are preserved. But these tests have been modified as a result of the abolition of the wife's dependant domicile. S. 2 of the Domicile and Matrimonial Proceedings Act 1973, amending s. 6 of the 1971 Act, makes
it clear that the domicile test and *Armitage v A-G* only apply if both spouses are domiciled in the granting jurisdiction, or the divorce is recognized by the spouses' common domicile. In addition, s. 6 is extended so that a foreign divorce will be recognized if it was obtained in the country of one spouse's domicile and recognized by the other spouse's domicile, or if it was recognized by the law of each spouse's domicile respectively.

The material time for these tests is the time when proceedings for a foreign divorce were instituted.

(d) **Proof of Facts**

Under the 1971 Act, express or implied findings of fact in foreign proceedings, including findings of domicile, habitual residence or nationality, are conclusive evidence of the fact found, if both spouses took part in the proceedings. If only one spouse took part then the fact found is only *prima facie* proof. However, this provision is only applicable to facts, by means of which the divorce was obtained, and on the basis of which jurisdiction was assumed.

There may well be instances when a spouse merely enters a formal appearance and takes no active part in the foreign suit, or when a spouse enters an appearance to protest the jurisdiction of the foreign court. In these circumstances the question arises: did both the spouses "take part" within the meaning of the Act? The question, as yet, appears to be unanswered but, strictly speaking, it would be hard to say that both spouses did not "take part" in those circumstances. Yet, in some cases, it may be unfair if a spouse were bound by false findings. Thus, it submitted that, even if both parties "took part" in the proceedings,
findings of fact should still only be prima facie proof in the court in which recognition is sought.

(e) Capacity, Retroactivity and Financial Protection

Neither spouse is precluded from remarrying if a divorce has been obtained which is recognized under the Act or by virtue of the remaining common law. This is the case even if the divorce would not be recognized as valid in any other country.

The Act is retroactive, but does not affect decisions made by a competent court prior to the operation of the Act regarding the validity or otherwise of a divorce.

No provision has yet been made in England to ensure adequate financial protection for a spouse after a valid foreign divorce has been obtained. However, in their efforts to circumvent this problem, the courts in England have begun to develop a "divisible divorce" type of solution. In Newmarch v Newmarch, the case which has gone the furthest in this context, it was held that the wife was entitled to maintenance under s. 27 of the Matrimonial Causes Act 1973, despite the fact that her husband had obtained a valid and recognized Australian divorce, because the action under s. 27 was commenced prior to the divorce proceedings. It is submitted that this decision was clearly incorrect in view of the fact that s. 27(2) of the 1973 Act states that the court shall not entertain an application under this section unless it would have jurisdiction to entertain proceedings for a judicial separation. Clearly, by the time the Newmarch case was heard there was no such jurisdiction, since the marriage had already been terminated.

Probably, the wording of the statutory provisions regarding financial support in England will prevent the English courts from extending the
divisible divorce doctrine as far as the American counterpart.

3. **STATUTORY GROUNDS OF ATTACK**

The exceptions to recognition pursuant to s. 8 of the 1971 Act do not appear to alter the common law to any significant extent. But these are now the only grounds on which recognition may be refused. A divorce will not be recognized in the United Kingdom if, in the eyes of English law, there was no subsisting marriage between the parties at the time when the divorce was granted or obtained. This exception is mandatory and applies to divorces obtained within or without the British Isles. Presumably, this was also the case at common law.

(a) **Lack of Notice**

By s. 8(2)(a)(i) a divorce obtained outside the British Isles, which would otherwise be recognized under the Act, may be refused recognition if it was obtained by one spouse, without such steps having been taken to give notice to the other spouse as reasonably should have been taken. In exercising its discretion under this provision the court is to have regard to all the circumstances and the nature of the proceedings. This corresponds with the "natural justice" ground of attack at common law, which is discussed above. The fact that the other spouse did not receive notice of the proceedings in the foreign court does not automatically mean that the divorce will be refused recognition on this ground. The provision recognizes that there are practical circumstances when a spouse may not be personally, served, and when it is necessary to dispense with service or employ substituted service procedures.

(b) **Lack of opportunity to take part in the proceedings**

By s. 8(2)(a)(ii), the court may refuse recognition to a foreign decree
if one of the spouses was unreasonably denied an opportunity to take part in the foreign proceedings, for any reason other than lack of notice.

Until recently there was no case involving lack of opportunity to take part in foreign proceedings which did not also involve lack of notice to the spouse concerned. But in Newmarch v Newmarch such an issue did come before the court. The facts were that the husband obtained an Australian divorce when his wife was resident in England. The wife had received ample notice of the Australian proceedings and had genuinely intended to defend them. However, due to no fault of the wife, the Australian lawyers which she had employed failed to take any action in the Australian proceedings, and a decree absolute was pronounced in favour of the husband. Rees J. was of the opinion that s. 8(2)(a)(ii) could be applied in this type of case. But he also stated that it was at the court's discretion whether or not to refuse recognition, even if there was no opportunity to take part in the proceedings. In deciding whether or not to refuse recognition the court had regard to all the circumstances of the case, including: the likely consequences if the spouse had been given an opportunity to be heard; an assessment of the legitimate objectives of the spouse concerned; to what extent those objectives can be achieved if the foreign decree remained valid, and the consequences to the spouses and children of the family if recognition were refused.

In the instant case Rees J. refused to apply s. 8(2)(a)(ii) because:

a) the marriage had broken down irretrievably, and the divorce would still have been granted, even if the wife had defended the suit (although the husband may have had to rely on different grounds);

b) the aim of the wife was to secure maintenance for herself and
that aim was not furthered in any way by refusing to recognize the decree.

More recently, in the interesting case of *Joyce v Joyce*, an English court refused recognition to a Canadian divorce *inter alia* on the basis of lack of opportunity to be heard.

In that case, it was held that there must be an effective opportunity to take part in the foreign proceedings, not merely an ability to take part in formalities. Lane J. stated that the respondent in the proceedings must not only have the right to be heard, but also "the ability or facility to place herself in a position to put her views before the court." Among the matters to be considered were: the date and circumstances in which the foreign proceedings were commenced; the availability of financial aid to the wife and children; the steps she had taken to put her case before the foreign court and the remedies available in that court.

(c) **Public Policy**

A foreign decree may not be recognized if its recognition would "manifestly be contrary to public policy." The word manifestly is probably redundant, since the discretion to refuse recognition on this ground is very sparingly exercised by the courts.

Dicey and Morris suggest that the "residual discretion," which the courts had at common law not to recognize a foreign decree, is abolished by the Act, but that the difference between the "substantial injustice" ground of attack and public policy may be purely semantic. The latter suggestion seems to be accurate. In *Kendall v Kendall* Hollings J. considered the public policy exception. In that case, the husband, who
was working in Bolivia, persuaded the wife to sign documents which were written in Spanish. The wife did not understand Spanish very well but signed the documents, believing that they were necessary in order for her and the children to leave Bolivia. After the wife had left the country, the husband obtained a Bolivian divorce, using the documents so that the wife appeared as petitioner on the record. The case before the Bolivian court was riddled with lies, for example, that the couple had no children and that the wife worked. (This was relevant to financial provision). Later, when both spouses had returned to England, the wife found out about the divorce. The court refused to recognize the decree under the public policy exception because of the husband's grossly fraudulent conduct.

Therefore, it appears that the substantial justice and public policy grounds of attack will be interpreted synonymously. And thus, as at common
law, although fraud per se is not a ground for non-recognition, it may amount to a "substantial injustice" in certain circumstances.

It seems that the public policy exception may also cover situations where one of the spouses has resorted to a foreign jurisdiction purely for divorce purposes.

This corresponds with the suggestions in *Indyka v Indyka* that the courts should refuse recognition of decrees obtained by means of forum shopping. It is submitted that this may be a convenient method of compromise between the two conflicting objectives in divorce recognition, namely prevention of forum shopping and limping marriages.
4. THE PROBLEM OF THE EXTRA-JUDICIAL DIVORCE

(a) Types of extra-judicial divorce

Divorces which are not obtained in a court of law may take a variety of different forms. Some countries provide for administrative divorces. Others, such as the Soviet Union at one time, allow divorce by mutual consent. Also, religious divorces are permitted in some countries. A Jewish gett, for example, is obtained before the Rabbinical court, which does not amount to a court of law.

One of the most common forms of extra-judicial divorce is the "talak" divorce under Moslem religious law. Under traditional "talak" procedure, all the husband has to do is pronounce three times his intention to end the marriage orally or in writing. It need not necessarily be in the presence of the wife or addressed to her, and it is not even required that the husband notify the wife that she is divorced. The talak may also be written in which case it is called a "talaknama." A divorce may also be obtained by agreement between the spouses for consideration paid by the wife to the husband. This is called "khul" and may also be obtained at the instance of the wife alone in certain circumstances. Also, for the wife's protection and to discourage rash divorces a fairly large dower is set for her on marriage, payable by the husband if he should divorce her.

Divorce procedures also vary; an extra-judicial divorce may be entirely informal such as the traditional talak, but sometimes a registration and reconciliation procedure is required.

(b) The Common Law

At one time the English courts refused to recognize non-judicial divorces, but it seems from Qureshi v Qureshi that, at common law,
such a divorce would be recognized in England, if it were valid according to the law of the spouses domicile, irrespective of where the divorce was obtained, provided that recognition would not cause a substantial injustice.

(c) The 1971 Act

The problems which have arisen in this context under the 1971 Act are mainly due to the failure of the English legislature to define clearly the types of extra-judicial divorce to which the Act was intended to apply. It seems that the Act was intended to cover some non-judicial divorces but not all informal divorces. Apparently, the criterion was supposed to be whether the divorce had the "nature or quality of an official act," yet it was agreed that the Act was intended to cover talak divorces. Thus, it is not clear whether informal or traditional talaks were meant to be included.

(i) Divorces obtained in the British Isles

Section 1 of the Act applies only to divorces granted under the "law of" i.e. in the courts of the British Isles. In an attempt to make the position more clear, s. 16(1) of the Domicile and Matrimonial Proceedings Act 1973 provides that no proceeding in the British Isles shall be regarded as validly dissolving a marriage unless instituted in the courts of law of one of those countries. However, section 16 operates prospectively, and does not affect the recognition of extra-judicial divorces obtained in the United Kingdom prior to January 1st, 1974, and the common law rules apply prior to that date.

The policy considerations behind this provision are, presumably, that the English legislature does not wish to permit evasion of English matrimonial
law and its safeguards in the future by United Kingdom residents. Thus, s. 16(2) of the 1973 Act provides further that a divorce obtained outside the British Isles by habitual residents of the United Kingdom is not to be recognized at common law (as preserved by s. 6) in certain circumstances.

However, several problems arise in relation to s. 16(1):

1) Are all extra-judicial divorces obtained by means of a "proceeding"? It has been debated whether a purely informal non-judicial divorce, such as a traditional talak or divorce by consent amounts to a "proceeding." If "proceeding" does require an element of formality which the traditional talak or a consensual divorce does not possess, these types of divorces may still be recognized if they are obtained in the British Isles after 1974, despite s. 16(1).

2) It is often difficult to tell where the "proceeding" takes place. If, for example, a talaknama is written in the United Kingdom and sent to East Africa to take effect on receipt by the wife, where does the proceeding take place?

3) The issue of recognition of the extra-judicial divorce may not arise directly, but only as an incidental question, for example, where the primary issue is a question of capacity to marry. If the Schwebel v. Ungar solution were adopted then the divorce would be effectively recognized in the United Kingdom, if the issue of validity of the divorce did not arise until a remarriage had taken place.
In addition, the distinction which is made by s. 16(1) of the 1973 Act, between extra-judicial divorces obtained in the British Isles and those obtained elsewhere is hard to justify. If the divorce is recognized by the law of the spouses' habitual residence, what good is done by refusing to recognize the divorce in the United Kingdom? If the husband is domiciled and habitually resident in England and the wife is domiciled and habitually resident in Pakistan, a *talak* divorce pronounced by the husband in England which complies with the Pakistan *Muslim Family Laws Ordinance* 1961 will be valid in Pakistan but not in England and thus a limping marriage is created. However, if the husband went to Pakistan, or even to France, and pronounced the divorce, it would be recognized under the habitual residence provision of the 1971 Act. Thus, s. 16(1) may create serious anomalies in divorce recognition cases in England.

(ii) *Overseas Divorces*

As stated above, section 2 defines "overseas divorces," for the purposes of the statutory recognition provisions, as those divorces 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."

Therefore, it seems the divorce must be "obtained" outside the British Isles by means of "proceedings" outside the British Isles. As stated previously, it may be difficult to say where a "proceeding" takes place and thus where an extra-judicial divorce is "obtained." What if a wife negotiates a "*khul*" with her husband by post, the husband being in England and the wife in Pakistan; the husband writes a *talaknama* to his wife, to take effect
in Pakistan, when the husband has received a monetary consideration from
the wife; surely, in these circumstances it would be argued that the
divorce was obtained in either, neither or both countries. Presumably
though, if any one of the proceedings by means of which the divorce was
obtained did take place in England, then s. 16(1) of the Domicile and
Matrimonial Proceedings Act 1973 would prevent recognition of the divorce,
even if the divorce were obtained abroad.

In R v Registrar of Births Deaths and Marriages, exparte Minhas

Park J. held that a talak was obtained in England when it was pronounced
in England and notice was sent from England to the wife, a Pakistan resident,
and the appropriate Pakistan council. This was the case, despite the fact
that the divorce did not take effect until the expiry of 90 days after the
pronouncement of the divorce and, despite the fact that the husband appeared
voluntarily before a conciliation council in Pakistan before the expiry of
the 90 day reconciliation period.

The Minhas case has since been explained by the House of Lords in

Quazi v Quazi as a misunderstanding of the Pakistan Muslim Family Laws
Ordinance 1961.

It is now clear from this decision of the House that the words, "other
proceedings," in s. 2 of the 1971 Act include proceedings which are not
judicial but which are officially recognized in the foreign state in
question. Thus, in the Quazi v Quazi case, it was held that a talak
followed by compliance with the Muslim Family Laws Ordinance amounted to
"other proceedings" within section 2.

The question is: do all extra-judicial divorces amount to "proceed-
ings," including "informal" talaks and divorces by mutual consent? It is
true that the word connotes some official or formal type of action; nevertheless, it is submitted that a religious act such as the pronouncement of a talak itself may be as much formal or official as an action in a court of law. Taking the ordinary meaning of the words, surely, any act which is sanctioned by a formal body, such as the state or the church, amounts to a "proceeding" or "proceedings." This point was expressly left open in Quazi v Quazi.

With regard to the common law, as preserved by the 1971 Act, there is no requirement of "proceedings" and, therefore, it seems that all extra-judicial divorces obtained abroad may be recognized by virtue of these rules, subject to section 16(2) of the 1973 Act.

(iii) Section 16(2) of the 1973 Act

This section was enacted so as to prevent evasion of English matrimonial law by United Kingdom residents in future. An extra-judicial divorce obtained abroad will not be recognized if (a) both parties to the marriage were habitually resident in the United Kingdom during the year immediately preceding the "institution of the proceeding," and (b) recognition is not required by the statutory provisions, notwithstanding that the common law provisions, would allow recognition.

It is somewhat illogical that non-judicial divorces should be singled out in this way. As stated by Lord Pearce in Igra v Igra:

"it has long been accepted that the court of the domicile is the proper tribunal to dissolve a marriage. Its decisions should, as far as reasonably possible, be acknowledged by other countries in the interests of comity. 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 criticize the standards of another country or too re­
luctant to recognize decrees that are valid by the law of the domicile."

In addition, this subordination of the common law to the statutory recognition tests is difficult to understand. There is no indication that the statutory tests are better connecting factors than the concept of domicile. In fact, as far as the nationality test is concerned, the reverse seems to be the case.

Furthermore, the subsection achieves very little. Its effect is to prohibit the operation of the rule in *Armitage v A-G.* where both the parties are habitual residents of the United Kingdom. Thus, a husband and wife in these circumstances cannot hop on a day trip to Calais and become validly non-judicially divorced, even if the divorce is recognized in the country of their domicile. But if an extra-judicial divorce were obtained in the country of either spouse's domicile or nationality, s. 16(2) would not apply because recognition would be required under the statutory provisions. In addition, s. 16(2) does not apply if only one of the spouses is an United Kingdom habitual resident.

Similar difficulties arise with respect to the word "proceeding" in s. 16(2), and the appropriateness of such terminology for non-judicial divorces, as with "proceedings" in the 1971 Act. For instance, it is hardly apt to speak in terms of "institution of the proceeding" when considering *talaks* and so on.

(d) **Extra-judicial divorces and the statutory grounds of attack**

Conceivably, it could be contended that some extra-judicial divorces should be refused recognition because of lack of notice, lack of opportunity to be heard on the part of the wife, or because such decrees were against
English public policy. However, it seems clear that at common law such divorces were no longer offensive to English public policy. Furthermore, the discretion to refuse recognition for lack of notice or opportunity to be heard is to be exercised "having regard to the nature of the proceedings and all the circumstances." Therefore, it seems that these provisions are not likely to be construed against the extra-judicial divorces which, by their nature, conflict with them.

(e) **Summary on Extra-judicial Divorces**

Clearly, the position is far from satisfactory under the 1971 Act. In addition to the terminological problems, the English legislature has made some highly complicated and illogical piecemeal amendments to the 1971 Act, which may cause serious inconsistency in the recognition of extra-judicial divorces. The recommendation in the final chapter of this part will be made with a view to preventing these inconsistencies.

5. **CONCLUSION**

There is no doubt that the 1971 Act represents an improvement from the *Indyka* test. Much uncertainty has been removed. Nevertheless, there are many problems inherent in the nationality test, and it is submitted that this was not a good innovation. Furthermore, the Act is rife with technical difficulties, especially in the context of extra-judicial divorces. As a result of this study, these problems can be anticipated in the formation of Canadian recommendations.

The exceptions to recognition are similar to those at common law. These seem reasonable, including the use of the public policy exception in order to discourage forum shopping.
Unfortunately, the English Act makes no provision for financial support after a foreign divorce is recognized. An attempt will be made to define and solve this pressing problem in Part III of the thesis.
CHAPTER 7

RECOMMENDATIONS

If adopted, the statutory reforms proposed below are made with a view to implementation as a new provision in the Divorce Act. The recognition of divorces granted pursuant to the Divorce Act itself would not be affected and thus s. 14 of the Act would remain the same. Nor are the provisions suggested here made in order to implement the 1968 Hague Convention on Recognition of Divorces and Legal Separations. Apart from anything else there could be constitutional difficulties since legal separations have traditionally been regarded as being within the legislative power of the provinces, not the federal government. Therefore, the proposals outlined below are limited to recognition of divorces.

They are based on the assumption that section 6(2) of the Divorce Act would be repealed and that the common law recognition tests would be abolished, preventing further development of judge made law.

RECOMMENDATION 1: GROUNDS FOR RECOGNITION

1. (1) A divorce which was not granted under this Act shall be recognized as valid in Canada if, and only if, it was recognized as valid in a law district in which either spouse was domiciled or habitually resident at the time the divorce was finalized.

1. (2) For the purposes of subsection (1) above a "law district" means a country, but where a country is comprised of territories having separate systems of law, a "law district" means the individual territory.

Thus, it is proposed that a divorce should be recognized in Canada if it was recognized as valid by the law of either spouse's domicile or habitual residence. Subsection 1 is phrased in such a way that divorces actually obtained in the country of habitual residence or domicile will be
recognized in Canada. For, if a valid divorce is obtained in a country, it is also "recognized as valid" in that country.

In addition, the provision involves an extension of the rule in Armitage v A-G to habitual residence cases. There are three justifications for this:

1) Because of the reforms to the law of domicile proposed in Part 1, habitual residence and domicile are likely to coincide in the majority of cases. And, if they do not coincide, habitual residence probably represents the more factual practical test in any event.

2) It is to be hoped that forum shopping will not be encouraged, since divorces obtained thereby may be refused recognition under the substantial injustice or public policy provision referred to below.

3) Such an extension may help to prevent limping marriages.

Nevertheless, it should be pointed out that there is the possibility that a divorce may be recognized by the habitual residence or the domicile of one spouse and not by the other. However, this potential problem seems to be an inevitable consequence of the equality of the sexes. Such a situation is possible with the current s. 6(2) of the Divorce Act, the real and substantial connection test and the English statutory provisions.

The reason for the choice of "habitual residence" as opposed to "residence", which was selected for jurisdiction purposes in Part 1, is that, while there is obvious justification for requiring more than mere residence for the purposes of recognition, it does not seem appropriate to impose a requirement of residence for a fixed period, such as a one year period, in the foreign jurisdiction, before recognition will be afforded in Canada. The use of the word "habitual" in this context seems to involve
a desirable quality of residence, without the imposition of a fixed time period.

For example, if H has lived in Nevada for eleven months and the Nevada court assumed jurisdiction to dissolve his marriage on the basis of residence for six weeks, and H continues to live in Nevada for five years thereafter, *prima facie*, there does not appear to be any justification for refusing recognition in Canada. A habitual residence test could afford recognition in such a case, whereas recognition would not be afforded by a one year residence test.

a. Extra-Judicial Divorces

Having submitted that there is no justification for a distinction between divorces obtained by non-judicial means and other divorces, the recommended provision allows for the recognition of extra-judicial divorces. It would appear that the technical difficulties experienced in England would be avoided, since the concept of "overseas divorces" has not been employed. Thus, the problem of deciding whether a divorce is "obtained" by means of "proceedings" abroad would be averted.

It is conceivable that an extra-judicial divorce granted within a Canadian law district may fall within the provision. As a matter of policy, it is submitted that this should not be encouraged generally. Presumably, the public policy exception to recognition would prevent recognition of such divorces in most instances. However, there are situations in which recognition of such a divorce may be justified, for example, if H and W are Israeli nationals and domiciliaries and H, having immigrated to Canada, obtains a *gett* divorce here, which is recognized as valid by the law of Israel, where W remains.
b. Domicile or Habitual Residence in a Territory or Federal Country?

Subsection 2 of the recommendation provides that the recognition tests be related to each individual territory of a federal country. The intention is not to deny the concept of federal domicile, but to avoid the following problem: if a divorce were recognized in Nevada but not in California, could it be said to be "recognized as valid" in the United States as a whole?

c. The Time Factor

The relevant time for the recognition test ought to be the time of the decree, not the date when proceedings were instituted. Therefore, a divorce would be recognized in Canada if it was recognized as valid in the country in which either spouse was habitually resident or domiciled at the date of the decree. Certainly, domicile or habitual residence at the time of filing the petition is relevant to the assumption of jurisdiction. But, as shown when discussing the rule in Armitage v A-G at common law, limping marriages may be more effectively prevented if the relevant date for recognition is the time of the decree.

This would not adversely affect the domicile test itself, because if jurisdiction is assumed on the basis of domicile when proceedings are instituted, and the spouse remains domiciled in the country concerned, the divorce will be recognized as valid in that country at the date of the decree. As such, the decree would be recognized in Canada. The same applies to the habitual residence test.

However, if the spouse has changed domicile between the date of institution of proceedings and the decree, the divorce would only be recognized if it is also recognized in the new domicile or habitual
residence, or recognized in the domicile or habitual residence of the other spouse. This seems reasonable because it may prevent a limping marriage arising between Canada and the new domicile or habitual residence of the spouse concerned. And the new domicile or habitual residence represents the country with which that spouse will be connected in practice in the future, whereas the old domicile (or habitual residence) may have ceased to have any real significance for that spouse.

One foreseeable problem with the suggested test is the possibility that the petitioner in the foreign proceedings may have moved to Canada after the institution of proceedings but before the final decree. In this situation, presumably, the divorce will only be recognized if it is recognized by the respondent's habitual residence or domicile, since it would be absurd to say that a divorce would be recognized in Canada if it were recognized as valid in Canada.

RECOMMENDATION 2: PROOF OF FACTS

1. (3) For the purposes of recognition of a divorce under this section any finding of fact (express or implied) made in the proceedings by means of which the divorce was obtained and on the basis of which jurisdiction was assumed shall be sufficient proof of that fact unless the contrary is shown.

1. (4) Nothing in this section shall be construed as requiring the recognition of any findings of fault made in divorce proceedings or of any orders for corollary relief made in such proceedings.

For reasons given in the context of the English Act, it is suggested that findings of fact in the foreign proceedings, on the basis of which jurisdiction was assumed, and on the basis of which the divorce was obtained, should merely be prima facie proof of the facts found. Thus, the Canadian
courts would not be bound by findings of domicile or habitual residence in foreign proceedings.

In addition, it would be wise to include a provision, similar to s. 8(3) of the Recognition of Divorces and Legal Separations Act 1971, to make it clear that the provisions herein do not require recognition of findings of fault or ancillary orders made in foreign proceedings. Obviously, other countries may have different standards in respect of grounds for divorces, maintenance and custody orders.

The use of the word "proceedings" will not present any difficulties, because the subsections relate only to judicial divorces. Thus, these provisions resemble sections 5 and 8(3) of the English Act, with the necessary alterations.

RECOMMENDATION 3: CAPACITY TO REMARRY

1. (5) Where a divorce is recognized by virtue of subsection (1) of this section, neither spouse shall be precluded from remarrying in Canada on the ground that the validity of the divorce would not be recognized in any other country.

This topic has been discussed above. The recommendation is that a spouse shall not be prohibited from remarrying in Canada merely because a divorce is not recognized in some other country. But the recommendation does not affect any other incapacity, unrelated to the divorce, which a person may be under according to the law of his or her domicile, for example, by reason of age, or lack of parental consent.

RECOMMENDATION 4: RETROACTIVITY

1. (6) The provisions of this section apply to divorces regardless of the date when they were obtained, but do not affect:

(a) the status of spouses if the validity or otherwise of a divorce has been determined by a court of law in Canada prior to the
commencement of this section, or

(b) property rights to which a person became entitled prior to the commencement of this section.

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As submitted above, the advantages of retroactive recognition will probably outweigh the potential disadvantages. Therefore, it is recommended that these provisions be retroactive.

However, certain safeguards are necessary:

1) so that the section does not affect the status of spouses when the validity or otherwise of their divorce has already been determined by a court of law in Canada;

2) so that the section does not affect property rights to which a person became entitled prior to the operation of the section.

RECOMMENDATION 5: GROUNDS FOR NON-RECOGNITION

1. (7) No divorce shall be recognized as valid in Canada if, at the time of the divorce, there was no subsisting marriage between the parties according to Canadian law.

1. (8) Notwithstanding subsection (1) of this section, the courts of any province in Canada may refuse to recognize a divorce if,

(a) the decree was obtained in a manner contrary to natural justice, or

(b) a substantial injustice occurred in granting the decree.

The common law grounds of attack seem to lead to a reasonable result, and the statutory grounds in England are very similar. This is an ideal area for judicial discretion provided, of course, that such discretion continues to be sparingly exercised. An example of this is the use of the public policy exception in Australia, and its suggested use in England,
in order to refuse recognition to decrees obtained as a result of forum shopping and which, thereby, cause an injustice.

The grounds for non-recognition, could be referred to as those "at common law". On the other hand, for greater certainty, it may be preferable to state explicitly the exceptions to recognition, namely, "natural justice," and "substantial injustice," or "public policy." The models taken for the provision above are "natural justice" and "substantial injustice." Also for greater certainty, it seems advisable to include a provision that no divorce shall be recognized in Canada if, at the time of the divorce, there was no subsisting marriage between the parties according to Canadian law.

**RECOMMENDATION 6: AMENDMENT TO S. 6(1) OF THE DIVORCE ACT**

In view of the submission that s. 6(2) of the Divorce Act should be repealed and the recommendation that recognition by the domicile or habitual residence of either spouse should afford recognition in Canada, it seems necessary and appropriate that s. 6(1) of the Divorce Act be amended to include divorce recognition purposes, as follows:

6. (1) For all purposes of establishing the jurisdiction Act, and for the purposes of divorce recognition in Canada, the domicile of a married woman shall be determined as if she were unmarried and, if she is a minor, as if she had attained her majority. (words recommended for addition are underlined).

Thus, persons who thought themselves to be validly divorced pursuant to s. 6(2), but who have not had their status judicially determined in Canada, would probably fall within the new provisions in any event.
PART 3: THE EFFECT OF FOREIGN DIVORCES ON THE RIGHT TO FINANCIAL SUPPORT

CHAPTER 8

INTRODUCTION

The purpose of this part is to examine the effect of both recognized and unrecognized foreign divorces on a spouse's right to financial support in Canada. There have been several decisions in the past regarding the effect of foreign divorces which are not recognized as valid in Canada and these will be considered first. The caselaw on the subject of invalid foreign divorces appears to be somewhat inconsistent and the application of the so-called "doctrine of preclusion" will be analysed so that the rules therein may be regularised. This analysis will also have some bearing on the second, more pressing problem of financial protection for the spouses after a valid and recognized foreign divorce has been obtained. In attempting to solve this latter problem in Canada, the American solution of "divisible divorce", and the jurisdictional and constitutional difficulties of such a solution in Canada will be considered. Finally, recommendations for reform will be made in statutory form.

A. THE EFFECT OF AN UNRECOGNIZED FOREIGN DIVORCE - THE DOCTRINE OF PRECLUSION

a. Background

A foreign divorce which is not recognized in Canada generally has no effect on the status of the parties and will not entitle them to remarry. But there are circumstances, when a monetary claim is made, in which one of the parties to a foreign divorce may be estopped from denying its validity. The typical situation is that of a wife, who obtains an unrecognized foreign
divorce from one of the United States and thereafter seek to claim a share of her husband's estate, as his widow. In those circumstances it has been held that the widow is estopped from impugning the validity of the decree of a foreign court, whose jurisdiction she invoked and, therefore, cannot claim against her deceased husband's estate. The basis of this "doctrine of preclusion" is equitable, or rather, the inequity of allowing a person to benefit financially from his or her status as a spouse, after he or she has invoked a foreign jurisdiction to dissolve the marriage.

This species of estoppel seems to have originated from the case of _Swaizie v Swaizie_, although there is at least one earlier instance when estoppel was applied against a party to a foreign divorce.

_Swaizie v Swaizie_ itself could be regarded as _obiter dictum_ on the point of estoppel. In that case the husband petitioned for a divorce in Wisconsin, having been married in Ontario. The Wisconsin court found in favour of the wife and granted a divorce plus alimony. The wife sought to recover the amount of the alimony order in Ontario. The husband contended that he never acquired the necessary domicile to give the foreign court jurisdiction.

Meredith C.J. said:

"It may perhaps be sufficient to hold, as I think we are warranted in doing, that the defendant has by his conduct precluded himself from objecting to the jurisdiction of the Wisconsin Court to pronounce the judgment sued on." He went on to find that the husband, who had been resident in Wisconsin for six years, did not satisfy his claim of want of jurisdiction on the part of the Wisconsin court, and that the
divorce should be recognized in Ontario. Later in the judgment he said:

"It is unnecessary to consider what the result would have been had my conclusion been that the Wisconsin Court had no jurisdiction to entertain the proceedings for divorce and whether that part of the judgment which assumes to dissolve the marriage in that case, not being entitled to recognition as a valid adjudication beyond the limits of Wisconsin, the other provisions of the judgment must fall or might be upheld, as not dealing with the status of the parties, but only with rights of property or with matters as to which something less than domicile is sufficient to give jurisdiction..."

Despite this uncertainty, _Swaizie v Swaizie_ has been followed in subsequent cases on the point of preclusion. But there have been others which disapproved the doctrine of preclusion: for example, Lamont J.A. in _Burnfield v Burnfield_ felt very strongly that there was no such doctrine of estoppel; and in _C v C_ it was held that the relationship of husband and wife was of such great public importance that the doctrine of estoppel could not be applied against a subsequent "spouse."

b. The Application of the Doctrine

A husband or wife, who obtains a foreign divorce which is not recognized in Canada may be estopped from claiming, on the death of the other spouse:

1. against the estate of the deceased as widow or widower,

2. insurance monies which were originally payable to the surviving spouse.

Either spouse may also be estopped from setting up an invalid divorce during the life of the other spouse in respect of alimony. In _Burpee v Burpee_, the husband obtained a divorce from his wife in Washington, and the wife was awarded alimony payable in monthly instalments.
Washington court awarded a final judgment of alimony for $5,000 and the wife sued on this judgment in British Columbia. McDonald J. found that all the merits were on the wife's side and also that the husband, having chosen his forum and having brought his action therein, was bound by the decision of that court. Thus, the Washington alimony judgment was enforced against him in British Columbia.

In Rosswrom v Rosswrom a wife's claim for alimony was dismissed after she had obtained an unrecognized divorce in Oklahoma, her state of residence. The wife was described as a querulous, dissatisfied, domineering woman, who had left her husband on several occasions to visit the United States. After she had insisted that the husband hand over to her most of the proceeds of sale of his hotel business, it was agreed that the parties should each go their separate ways. The wife moved to Oklahoma in 1907 and obtained a divorce. She carried on business in that state and lived there until 1912, when she returned to Canada, seemingly for the purpose of obtaining alimony from her estranged husband.

Kelly J. found that: the wife had no just cause for complaint against the husband; her conduct was such that the claim should be disallowed; she was bound by the Oklahoma divorce insofar as to disentitle her to alimony.

While the decision in Burpee v Burpee and Rosswrom v Rosswrom can be explained on the basis of the conduct of the spouses in those cases, a more recent decision of the Ontario Court of Appeal in Nunn v Nunn seems to overlook the conduct of the spouses altogether. In the Nunn case the wife obtained an alimony judgment in Ontario on the grounds of desertion by the husband, and five years later obtained a divorce in Connecticut, after she had been resident there for three years. The
husband sought to have the original alimony order discharged in Ontario. The Court of Appeal took the position that the very fact of obtaining a divorce meant that the wife consented to the husband thereafter living separate and apart from her. Thus, it was held, Schroeder J.A. dissenting, that the wife ought not to be allowed to continue to receive alimony, and the Ontario order was discharged.

The rationale of this decision would perhaps be more suited to some of the more primitive judgments of the nineteenth century. In this case the fault was clearly on the husband's side, for it was he who deserted his wife. There are obvious circumstances in which such a wife ought to be able to obtain alimony from the husband: for example, if she has to care for the young children of the marriage and is, therefore, unable to support herself. If the foreign court did not have personal jurisdiction over the husband, and if the husband had no real property within the foreign jurisdiction, the only court to which a wife may have recourse in order to obtain financial support may be the court of the husband's domicile or residence.

c. Limits of the Preclusion Doctrine

The doctrine of preclusion applies only in cases involving pecuniary claims and is not applicable in actions to determine the status of the parties. Thus, a spouse or subsequent "spouse" will not be precluded from obtaining a divorce or nullity decree in Canada after an invalid foreign divorce. Presumably, the court would have regard to the conduct of the parties when deciding on financial relief upon granting a divorce or nullity decree.

In addition, it seems that the doctrine is only applicable as between
the spouses or their representatives, and cannot be applied against a third party, such as a subsequent "spouse" even if the third party helped to obtain the foreign divorce. Nor can it be applied against one of the parties to the foreign divorce in favour of a subsequent "spouse". The reason for this seems to be that this would have the effect of conferring a married status on the subsequent "spouse", which in law he has never possessed because the subsequent marriage into which he entered was void.

In addition to the reason given above, it is submitted that it would be unwise to extend the doctrine of preclusion to third parties, because further considerations may arise as a result of a remarriage by one of the spouses, and the application of the doctrine would be even less certain than it is already. In any event a subsequent "spouse" would probably have an adequate remedy in respect of alimony. The provincial legislation usually empowers the court to award maintenance upon a declaration of nullity if it is warranted under the circumstances. However, such a "spouse" may not have the right to claim a share of her deceased husband's estate.

d. Current Trends

Downton v Royal Trust Co. is a fairly recent decision of the Supreme Court of Canada, which is inconsistent with some of the earlier decisions, at least in respect of claims against the estate of a deceased spouse.

The facts were that H married W in 1948 in Newfoundland. The spouses separated in 1960 and entered into a separation agreement under which H was to pay W monthly maintenance. At the same time H signed a note for a lump sum amount in favour of W. In 1965 H went to Nevada, obtained a
divorce, remarried on the day of the decree absolute, and returned to Newfoundland. Prior to the divorce a Nevada lawyer wrote to W to ask her to sign an enclosed power of attorney to authorize an appearance on her behalf in the divorce action. The power of attorney specified that the terms of the separation agreement were to be incorporated into the decree. W signed the power of attorney, but included a further condition that H should satisfy his obligation to W for the lump sum under the note. These obligations were incorporated into the Nevada divorce. After the death of H, W applied to the Supreme Court of Newfoundland for relief under the provisions of the Family Relief Act.

Laskin J. reviewed the authorities and stated that the ethical or equitable basis of the doctrine of preclusion was lost when both parties invoke (and submit to) the foreign tribunal, and other considerations must be brought into account if the doctrine is to apply.

This is somewhat inconsistent with other cases. For example, in the old case of Stevens v Fisk the husband was estopped from denying the validity of a New York divorce, obtained by the wife, because of his voluntary appearance in the proceedings, and the wife was entitled to an accounting of her property, which was in his hands, without authorization from the husband or the court.

Further, in Royal Trust Co. v Jones, it was held, inter alia, that the first wife was precluded from succeeding to her husband's estate because she had obtained a Nevada divorce, even though the husband had entered a general appearance in the Nevada proceedings and had subsequently remarried.

In the Downton case Laskin J. was also in favour of a "broad and flexible approach" towards the application of the doctrine of preclusion,
and approved the American Law Institute's Second Restatement of the law on this subject.

The court in the Downton case went on to hold that the wife was not precluded from claiming against H's estate. The further considerations taken into account were:

1. the fact that she submitted to the foreign jurisdiction only to protect existing rights under the Newfoundland separation agreement.

2. the fact that she had not acted on the decree, nor accepted any benefits under it.

As to the second point, none of the earlier authorities involving claims against the estate of a deceased spouse have been concerned with the subsequent conduct of a party to the divorce. In the earlier cases the very fact that a wife obtained a foreign divorce was sufficient for the doctrine to apply. Nevertheless, it is submitted that the more flexible approach advocated by the Supreme Court of Canada is preferable, because it enables consideration of all the circumstances of the case and thus leads to a more equitable result.

The Downton case may also be explained on the narrower basis that it was not the wife who obtained the divorce, and in that case is authority for one of the following propositions:

1. if a spouse does not obtain the divorce, the doctrine of estoppel does not apply against that spouse even though he or she enters an appearance in the foreign proceedings.

2. if a spouse does not obtain the divorce, he or she will be precluded from claiming against the estate of the other only if he or she
submitted to the jurisdiction, and acted on the decree, for example, by taking benefits under it or by remarrying.

However, the wider approach suggested in the *Downton* case has been followed in *Re Jones*, where a wife obtained an invalid foreign divorce in California in 1927. The deceased husband had remarried and the wife thereafter held herself out as a single woman. The deceased, who had seen the wife several times since the divorce and given her money, had promised to provide for her in his will. Reid J. held that the wife was not precluded from claiming against the deceased's estate when he failed to provide for her in his will because, even though it was she who obtained the divorce:

1. she had gained no pecuniary advantage from the divorce; and
2. considering all the aspects of the case, equity was on the wife's side.

e. **Summary**

In the cases involving claims for alimony by a wife after she has obtained a foreign divorce, there seems to be little use for the application of a doctrine of estoppel based on the conduct of the parties. The right to alimony depends on the conduct of the spouses in any event, and this is indicated in the cases by the fact that the courts have first found that there is no just cause for alimony, and then stated that the wife would be estopped.

The cases indicate that the doctrine does not apply in respect of third parties and, as stated previously, it is submitted that this is justified on the grounds of certainty, particularly since a subsequent
"wife" would more than likely have an adequate remedy in respect of alimony.

The use of estoppel by conduct to enforce alimony orders of a foreign court seems reasonable. In some cases it may be very inconvenient if a spouse, who was a party to foreign divorce proceedings could deny the other the benefits awarded in those proceedings. Enforcement of a foreign alimony order in appropriate circumstances would save the necessity of a retrial in the court of the forum - a retrial which may well lead to a result similar to the foreign alimony order.

The succession cases are moving away from the idea that the very fact of a foreign divorce is sufficient to estop the spouse who obtained it. Consideration of all the circumstances, including the conduct of the parties, leads to a more equitable solution, and is more in line with the cases which involve claims to alimony. In view of this flexible approach, it may be possible now for a spouse who did not take part in the foreign proceedings to be precluded from obtaining financial benefit from the other spouse in Canadian proceedings. For example, the "absent" spouse may be precluded if he or she has subsequently remarried on the strength of the decree.

The recommendations at the end of this part will include a provision which, it is hoped, will regularise the doctrine of preclusion according to the findings which have resulted from this study. However, there may be fewer instances of the application of the doctrine in future because more divorces may be recognized, in view of the trend towards relaxed recognition rules.
B. THE EFFECT OF A RECOGNIZED FOREIGN DIVORCE

a. Divisible Divorce

A divorce which is recognized as valid in Canada terminates the 
married status and generally enables the parties concerned to remarry.
Now that the recognition rules are more relaxed, the possibility of one 
spouse unilaterally obtaining a foreign divorce is increased. Assuming 
that no maintenance is awarded in the foreign proceedings, what financial 
protection is and should be afforded to the absent spouse after a valid 
foreign divorce? This was one of the concerns expressed by the House of 
Lords when the real and substantial connection test was initiated.
In fact, the English courts are now faced more and more often with the 
problem of lack of financial protection for the wives in these cir-
cumstances.

In Canada there is very little protection, if any, for the spouses 
after a foreign divorce. Maintenance cannot be awarded under s. 11(1) of 
the Divorce Act unless the decree of divorce is granted under that Act;
by s. 11(1) maintenance may only be ordered "upon granting a decree nisi 
of divorce."

A valid dissolution of marriage used to be and still is in some 
provinces a bar to an order for maintenance. This is because of the 
terms of the provincial legislation, which is limited in application to 
a husband or wife. However, provincial maintenance legislation in 
Alberta and British Columbia provides for maintenance after a 
divorce has been obtained. This legislation is sufficiently broad in 
terms to cover maintenance after foreign divorces although the point
does not appear to have been litigated. Under the Ontario legislation, a divorce may be "divisible" to the extent that a prior Ontario provincial maintenance order survives a divorce, unless the question of support was judicially determined.

b. The American Solution

The possibility of one spouse unilaterally obtaining a divorce has existed for some time in the United States. In 1942 the Supreme Court of the United States held that domicile of the petitioner alone was sufficient to found jurisdiction to terminate marital status. Normally, under the United States Constitution, a decree granted on this basis would be entitled to "full faith and credit" in the rest of the United States. Thus, the decree would normally be effective to terminate the married status.

The question arose as to whether a valid "ex parte" (unilateral) divorce was effective to terminate thereafter the absent spouse's right to financial support.

In Estin v Estin, while both spouses were domiciled in New York, a wife had obtained a separation and alimony judgment in New York. Later the husband went to live in Nevada and obtained a divorce there which made no provision for the support of the wife. After the Nevada divorce the husband ceased paying alimony and the wife sued for arrears in New York. The Supreme Court of the United States held that New York could continue to enforce the prior alimony judgment in favour of the wife and stated:

"The result in this situation is to make the divorce divisible - to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It
accommodates the interests of both Nevada and New York in the broken marriage by restricting each state to the matters of her dominant concern." 17

The "divisible divorce" doctrine is not limited to situations where a prior alimony order is in existence. In Vanderbilt v Vanderbilt, an alimony judgment was awarded in New York after a valid "ex parte" divorce had been granted elsewhere. Also in the Vanderbilt case, New York was not the matrimonial home. The parties had lived together in California and the wife had moved to New York to live after separating from her husband, but before the Nevada divorce petition was filed.

However, it is at the discretion of each state whether or not to award maintenance after a valid ex parte has been obtained; some states allow such awards, others do not.

In some cases a wife has been permitted to obtain alimony after she, herself has obtained an ex parte decree. In Blech v Blech Arizona awarded alimony to a wife, after she had obtained an extra-state, ex parte divorce, because the state granting the divorce had no jurisdiction over the husband to award alimony against him. In Portnoy v Portnoy it was held in Nevada that a wife could maintain an alimony action against her former husband because she did not have the opportunity to litigate support rights when she obtained the valid ex parte divorce decree.

However, a divorce court which has personal jurisdiction over the wife can terminate her right to alimony. Thus, if both spouses take part in the divorce proceedings, the decreeing state may adjudicate on the right to support and such adjudication will be entitled to full faith and credit in the other states.
c. Should the divisible divorce doctrine be limited to ex parte divorces?

The rationale of "divisible divorce" has been explained in the United States in terms of each state's "interest" in the parties: the state of the wife's residence has an interest in her welfare, lest she becomes a public charge; the husband's domicile, which grants the divorce, has an interest in terminating his dead marriage and thus regularizing his affairs in the state of his domicile.

This reasoning is equally applicable to Canada as a whole; this country has an interest in the welfare of its residents, whose marriages have been terminated by foreign divorce, and also in terminating the dead marriages of its domiciliaries and habitual residents. Assuming that the wife is a Canadian resident, it would be highly inequitable if the husband could unilaterally deprive her of the right to claim maintenance in Canada by means of a valid foreign divorce.

But should a wife be able to claim maintenance in Canada after she, herself has obtained a foreign ex parte decree? What if both parties take part in the proceedings?

An analogy can be drawn here between the effect of valid and invalid foreign divorces. In the case of divorces which are not recognized in Canada, the answer depends on the conduct of the spouses and all the circumstances of the case. It is submitted that the overriding consideration in the case of recognized foreign divorces also should be to ensure equity as between the spouses (or rather, the ex-spouses) having regard to all circumstances.

Clearly, there may be circumstances when a wife who has obtained an ex parte divorce abroad should be able to get maintenance in Canada, for
example, when the foreign court did not have jurisdiction over the husband to award maintenance, and the Canadian court does have such jurisdiction.

Where both parties appeared in the foreign proceedings, there may also be situations in which a spouse ought to be able to claim maintenance in later Canadian proceedings, for example, when a wife merely entered a formal appearance in the foreign proceedings and took no active part, or when the wife appeared merely to contest the foreign jurisdiction.

Where circumstances have changed since the foreign divorce was obtained, there may be a case for awarding maintenance in Canadian proceedings. To take the facts of Goldstein v Goldstein (a domestic divorce case) the ex-wife may have become considerably less able to maintain herself since the time of the divorce, whereas the ex-husband may have prospered since that time.

On the other hand, there may be circumstances in which maintenance after a foreign divorce ought not to be awarded, for example, when the parties agreed between themselves for a monetary consideration that one spouse should not thereafter be liable to maintain the other. It may also be inequitable to award maintenance to an ex-spouse many years after the foreign divorce was granted, if there has been no contact between the ex-spouses during the years; the payee may have taken on new responsibilities in the belief that his liability towards the ex-spouse had ended. Since the courts are already concerned with these types of situations in domestic divorce cases, there should be no difficulty in applying existing principles to foreign divorce cases.

Thus, it is submitted that there ought to be provisions enabling a spouse to obtain maintenance in Canada after a recognized foreign divorce, regardless
of who took part in the foreign proceedings. However, whether or not to award maintenance should be left to the discretion of the court, having regard to the circumstances of each case.

d. Jurisdiction

If provision is made enabling an ex-spouse to claim maintenance in Canada after a foreign divorce, should there be a jurisdictional requirement?

There are four alternatives here:

1. to use the same jurisdictional requirement as for divorce itself;
2. to have no jurisdictional requirement at all;
3. to leave the matter to the ordinary in personam jurisdiction rules of each province. In British Columbia, for example, this means to have no jurisdictional rules, because service out of province is permitted in all matrimonial actions;
4. to have a separate jurisdictional test in "divisible divorce" cases.

It is submitted that alternative (1) above would not be desirable since the requirement, under current Canadian Law, would be for the petitioner to be domiciled in Canada, coupled with ordinary residence of the petitioner or respondent for at least one year in the province in which the action is brought. Clearly, there is no justification for this in a maintenance action which does not affect the status of the parties. Assuming, for example, that there are divisible divorce provisions in Canada, H goes to live in California, leaving W and his children in Alberta. Having established a "real and substantial connection", H obtains a divorce in California which is recognized in Canada. W has
just moved to British Columbia and wishes to obtain financial support from H. Even if the suggested divorce jurisdiction rules were adopted, the wife would have to wait at least one year before she could maintain such an action in British Columbia. But had she remained in Alberta, she would have been eligible to claim for maintenance immediately. To take another example: the wife is not domiciled in Canada but her husband is a Canadian domiciliary and resident. Under the existing divorce jurisdiction rules the wife would not be able to obtain maintenance from her husband after a foreign divorce because the requirement is for the petitioner to be domiciled in Canada.

Furthermore, there would be little point in bringing an action for maintenance in Canada unless the order would be enforceable against the defendant (usually the husband). A personal judgment is enforceable against the defendant if the court rendering the judgment had jurisdiction over the defendant according to the rules of the enforcing court. One of the most common grounds for enforcing a judgment in personam is residence of the defendant within the jurisdiction of the court when notice of proceedings was served on him. Thus, there is little encouragement to bring a maintenance action here unless the defendant (husband) is resident in a province of Canada.

However, were a "divisible divorce" provision introduced into the Divorce Act, an order for maintenance would be enforceable across Canada. Should there be a provincial residence requirement? It seems that there should. Take the following example: the spouses were living in Washington State, but when they split up the husband returned to his native Ontario. The wife then obtains a divorce in Washington but no provision for maintenance is made because the Washington court did not have jurisdiction over the
husband. If there were no provincial residence requirement, the ex-wife would be able to claim maintenance under the Divorce Act in British Columbia, a province with which there has never been any connection, and have the order enforced against the husband in Ontario. This hardly seems fair to the husband. In this situation the wife should be required to bring the action in Ontario, the province of the defendant husband's residence, so that he may have the opportunity to defend the case without the inconvenience of travelling to the West Coast of Canada. For this reason it is submitted that alternatives (2) and (3) above are unacceptable, and that a separate jurisdictional test of provincial residence may be justified in divisible divorce cases.

Should the residential requirement be limited to residence of the defendant? It seems not. What if the claimant wife is also a resident in a province of Canada? If the sole criterion were residence of the defendant (usually the ex-husband), then jurisdiction would be dependent on the whim of the ex-husband - he could conceivably move from province to province to thwart his ex-wife's attempts to obtain support. If the ex-wife is a Canadian resident there seems to be no reason to deny her the right of action in her province of residence. Imagine, for example, that the spouses lived in British Columbia and when they separated the husband went to California to live. Having established a "real and substantial connection" he obtains a divorce in California which is recognized in Canada. Then he returns to Canada to live in Ontario. There seems to be good reason to allow the wife to petition in the province of her residence - the family home was in British Columbia and there has been at all times a connection with British Columbia.
Of course there is always the possibility that a wife, such as the Washington wife in the first example above, may set up residence in British Columbia purely in order to bring an action for maintenance against a husband who is resident in a different province. It is to be hoped that the instances of this would be rare and the advantage of allowing a wife to petition in her province of residence (as in the second example above) would outweigh the potential disadvantage of forum shopping by a foreign wife. In any event, the doctrine of forum non conveniens could apply to prevent such an action from proceeding.

Thus, the "divisible divorce" recommendations at the end of this chapter will include a jurisdictional requirement of residence of the plaintiff or the defendant in the provinces in which the action is brought and, in order to correspond with the grounds for enforcing a personal judgment at common law, the relevant time for determining residence will be when notice of the proceedings is served on the defendant.

e. The Constitutional Debate

Having submitted that there should be provisions enabling an ex-spouse to obtain financial support after a valid foreign divorce, the question arises as to whether the recommendations should be directed towards the federal or the provincial legislature. Under the British North America Act 1867, the federal government is given the power to legislate on marriage and divorce, but the provincial governments are to regulate property and civil rights in the province. Alimony or maintenance (and custody of children) are not specifically mentioned.
These subjects may be considered civil rights, and the question is whether they may be the subject of legislation by the Parliament of Canada when they are incidental to a foreign divorce.

This very problem has been the subject of much litigation in relation to divorces granted under the Divorce Act in Canada, and it has been held by the Supreme Court of Canada that the provisions in the Divorce Act relating to corollary relief are within the power of the federal Parliament. Indeed, in Goldstein v Goldstein it was felt that provincial maintenance legislation is ineffective after a divorce has been granted. However, the Goldstein case was not approved on this point in Hughes v Hughes.

Section 11(1) of the Divorce Act empowers the court to make orders in respect of maintenance of the spouses and children (and custody orders) "upon granting a decree nisi." This phrase has been interpreted very liberally by the courts and, in appropriate circumstances, maintenance has been awarded under s. 11 months, and even years, after the decree absolute of divorce. In Goldstein v Goldstein McGillivray, C.J.A. stated: "To my mind, it would bring the law into disrepute in the eyes of the public whom it is intended to serve to hold that a spouse who is given money by way of maintenance, and who then applied to vary that order by way of changed circumstances, should be in a different position than the lady who asked for no award as it was obvious that her husband was not then in a position to make any payment, but who later finds the respective circumstances very much altered."

As stated above, this reasoning is equally applicable in the case of changed circumstances arising after a foreign divorce. If the federal
government has power to legislate on support rights after divorce, then it follows that it should have the same power in respect of all divorces, including foreign ones. Thus, it seems there is authority for the adoption of provisions into the Divorce Act to deal with financial protection for the spouses after a foreign divorce.

Furthermore, it is submitted that, for the sake of uniformity, it would be preferable to incorporate such provisions into the federal act. An order made under the Divorce Act would be enforceable across Canada. What would be the outcome if some provinces enacted "divisible divorce" legislation but others did not? A wife could obtain maintenance after a recognized foreign divorce in a "divisible divorce" province and they may move to a "non divisible divorce" province. Should the maintenance order continue to be enforceable in the latter province?

If some provinces had divisible divorce legislation but others did not the spouses would be encouraged to shop for a forum in which to bring their action. What should happen if a wife moves from a "non divisible divorce" province after a foreign divorce has been obtained to a "divisible divorce" province? As mentioned above, the terms of some but not all, current provincial legislation are wide enough to involve a "divisible divorce" situation. It is submitted that federal legislation would be preferable in order to avoid the potential problems outlined above.

A further consideration on the point of uniformity is that the jurisdictional requirements for the application of provincial legislation may vary. In Alberta on an application for alimony the jurisdictional requirements relating to domicile, residence, and the matrimonial home
apply to both parties to the application, whereas in other provinces there are no jurisdictional requirements.

In conclusion, the recommendations herein, as to financial support are directed towards the federal legislature. However, if the matter is to be left to the provinces, it is submitted that provisions should be adopted having an effect similar to those recommended in the federal context.

C. RECOMMENDATIONS

The recommendations below are laid out in statutory form for the sake of convenience.

(A) Unrecognized Foreign Divorces

1. (1) A divorce which is not recognized as valid in Canada has no effect on the status of the spouses.

1. (2) A spouse may be precluded from obtaining financial benefit from the other spouse if,

   (a) a divorce has been obtained which is not recognized as valid in Canada, and

   (b) the court is of the opinion that, having regard to all the circumstances of the case, it would be unjust to allow that spouse to obtain a financial benefit.

1. (3) Without limiting or restricting subsection (2) above, a "spouse" within that subsection includes the estate of a deceased spouse.

1. (4) Without limiting or restricting subsection (2) above, "financial benefit" includes:

   (i) the benefit of succession to a deceased spouse's estate,

   (ii) the benefit of alimony or maintenance from the other spouse,
(iii) the benefit of non-enforcement of a foreign alimony judgment,

(iv) the benefit to the estate of non-succession by the other spouse.

(B) Recognized Foreign Divorces

11(1)A. The court may on an application after a dissolution of marriage which was not made under this Act, but which is recognized as valid in Canada, make any of the orders in subsections (1)(a) or (b) of this section if it thinks fit and just to do so, having regard to all the circumstances of the case; and, for the purposes of this subsection, the reference in subsection (1)(a) or (b) to "wife" and "husband" shall include an ex-wife and an ex-husband.

For the sake of greater certainty it is submitted that s. 11(1) of the Divorce Act, which regulates support after a Canadian divorce, should be amended to read "Upon granting a decree nisi of divorce or thereafter..." (underlined words added).

It is envisaged that the provisions set out above in respect of maintenance after a valid foreign divorce would be slotted into s. 11 of the Divorce Act, so that an order made under the recommended provision would automatically be included in the variation and rescission provision and recognition and enforcement provisions of the act. The use of the phrase "dissolution of marriage ... recognized as valid in Canada" is used in preference to such phrases as "recognized foreign divorce" because of the difficulty which may be encountered in deciding where an extra-judicial divorce was obtained. It may well be that an extra-judicial divorce would be recognized in Canada, for example, if it was pronounced here and registered abroad, and if the parties were domiciled in a
country which recognized the dissolution. However, if the divorce was pronounced in Canada it would be very difficult to call it a "foreign divorce", or to say that it was obtained abroad.

(C) The Jurisdictional Recommendation

11(3) For the purposes of subsection 11(1)A above, s. 5(1) of this Act does not apply and an order pursuant to subsection 11(1)(a) or (b) shall not be made in the case of a dissolution of marriage not made under this Act, unless the plaintiff or the defendant is a resident of the province in which the application is filed when notice of the proceedings is served on the defendant.

For the sake of convenience and certainty this recommendation has been put into s. 11 of the Divorce Act. However, the jurisdictional provision could be slotted into s. 5 of the Divorce Act (if preferred), or possibly into each province's Supreme Court Rules for *in personam* jurisdiction.

Possibly, the divorce rules for each province may also have to be amended to provide procedures for such an application, although there are probably sufficient provisions in the Supreme Court Rules of each province.
FOOTNOTES

CHAPTER 1

1. E.G. between 1967 and 1976 (inclusive) there were 1,699,975 immigrants to Canada. The figures for 1974, 1975 and 1976 respectively were: 218,465; 187,881; 149,429. See the 1976 Immigration Statistics issued by the Immigration Division of the Department of Manpower and Immigration.

2. See p. 3, infra.

3. See p. 6, infra.

4. See p. 11, infra.

5. See p. 43, infra.


7. This term is used to describe a territory governed by a single legal system. This usually means a country such as Scotland, but under a federal system of law, such as Canada, it means a province, such as Ontario or Saskatchewan.


9. See the English Law Commission's Published Working Paper No. 28, Family Law, Jurisdiction in Matrimonial Causes (other than nullity), 21 April 1970, para. 8, hereinafter referred to as Law Commission, Working Paper No. 28. Some of the causes of limping marriages are: refusal by some countries to recognize divorces at all, see e.g. R v Brentwood Registrar of Marriages, [1968] 2 Q.B. 956; differing jurisdictional rules in various countries, and differing substantive grounds of divorce, see Rabel, The Conflict of Laws: A Comparative Study, 2nd ed. (1958), 426, 428. Under German law the substantive grounds of divorce may be relevant to recognition, see Rabel, ibid., 515.

10. The English Law Commission did not feel that this was a pressing problem in England, ibid., para. 9.


12. 20 & 21 Vic. c. 85, hereinafter referred to as the Divorce and Matrimonial Causes Act 1857.

13. This was the equivalent of a judicial separation.


16. 30 & 31 Vic. c. 3, s. 91(26).

17. The Divorce Act (Ontario) 1930, c. 14 gave Ontario a divorce law as it existed in 1870; but the federal government did not enact its own divorce legislation until 1968, see the Divorce Act 1968, R.S.C. 1970, c. D-8.

18. Ibid.


21. Ibid., 540.


23. Ibid.


27. See Bater v Bater, [1909] P. 209, where the opinion expressed was that a wife, if living apart from her husband, could elect to have the same domicile as her husband, or have her domicile determined separately; also Ogden v Ogden, [1908] P. 46, followed in Stathatos v Stathatos, [1913] P. 46 and De Montaigu v De Montaigu, [1913] P. 154, which indicated that the theory of unity of domicile could be departed from in certain circumstances.


30. C. 15(repealed).

31. C. 57(repealed), also s. 40(1)(a) Matrimonial Causes Act 1965, c. 72(repealed).

32. S. 1, c. 100(repealed), also s. 40(1)(b) Matrimonial Causes Act 1965, ibid.

33. Several recommendations for reform of the law of domicile have been made; see e.g. The Seventh Report of the Private International Law Committee. See also Castel, Conflict of Laws, Cases, Notes and Materials, (3rd ed.) 187.

34. See Udny v Udny (1869), L.R. 1 Sc. & Div. 441; an illegitimate child takes the domicile of his mother at the date of birth as his domicile of origin. A foundling would have his domicile of origin in the law district in which he was found, see Re McKenzie (1951), S.R.N.S.W. 293.


36. Mundell v Mundell (1958), 65 Man. R. 314 (Q.B.) Trottier v Rajotte, [1940] S.C.R. 203, In Re Murray Estate (1921), 31 Man. R. 362 (K.B.), Winans v A-G, ibid.; contrast Wilson v Wilson, n. 20, supra, where a change of domicile was inferred from the declaration of intent and insufficient evidence to induce the court not to believe it. Contrast further Dickson J. in Powell v Cockburn (1976), 22 R.F.L. 155, 161 (S.C.C.) who when speaking, inter alia, of the presumption in favour of the domicile of origin said: "Their only effect is to impose a duty on the party against whom they operate to adduce some evidence ... evidence having been led on each issue the presumptions disappeared. It fell then to the trier of fact to decide the issues upon all of the evidence adduced ..." Thus, it seems that Dickson J. is of the opinion that the onus of proving change from domicile of origin is not particularly heavy.


39. See e.g. Winans v A-G, n. 35, supra; Ramsay v Liverpool Royal Infirmary, [1930] A.C. 588 (H.L.); I.R.C. v Bullock, [1976] 3 All E.R. 353 (C.A.); Udny v Udny, n. 34, supra; Trottier v Rajotte, n. 36, supra.
40. Udny v Udny, n. 34, supra.

41. Ibid.

42. Ibid., 457; approved in Trottier v Rajotte, n. 36, supra.

43. In the Estate of Fuld, n. 38, supra, 684 and see I.R.C. v Bullock, n. 39, supra.


45. See Walsh v Herman (1908), 7 W.L.R. 388 (B.C.C.A.), Young v Young (1960), 21 D.L.R. (2d) 616 (Man. C.A.).
CHAPTER 2


3. Ibid.

4. 1, Canada Committee Reports, Divorce, 1967, 12.

5. Suggested, inter alia, by the Manitoba Bar Association and the Law Society of British Columbia, ibid.

6. Ibid.

6A. See the discussion on residence requirements under the Divorce Act, p. 17, infra.

7. See p. 3, n. 10, supra.


9. See s. 3 of the Recognition of Divorces and Legal Separations Act 1971, c. 53.


11. See Indyka v Indyka, [1969] 1 A.C. 33 (H.L.); this test has been applied in Canada, see p. 95, infra.


13. Hereinafter referred to as s. 5(1)(a)(b), respectively.

14. N. 4, supra.

15. See objectives 6 and 7, p. 3, supra.

17. See Dimitrijevic v Dimitrijevic, n. 2, supra, although in that case it was specifically stated that the respondent was domiciled in Canada.


20. N. 4, supra.


23. Khalifa v Khalifa, ibid., Jablonowski v Jablonowski, n. 19, supra.

24. N. 22, supra.

25. See p. 8, supra.


27. See p. 8, supra.

28. See objective no. 1, p. 2, supra.


30. Udny v Udny (1869), L.R. 1 Sc. & Div. 441.

31. See Mendes Da Costa, 2, Studies in Canadian Family Law, Ch. 16, 915 and authorities cited therein.

32. Ibid.

33. See p. 14, supra.

34. Which provides that the petitioner himself must be domiciled in Canada, see p. 14, supra.


37. Hardy v Hardy, ibid.
38. See p. 2, supra.

39. N. 35, supra.

40. Stransky v Stransky, [1954] 2 All E.R. 536, where Karminski J. in order to determine whether or not a wife was ordinarily resident in England for divorce purposes, asked the question, "Where ... was the wife's real home?"

41. E.G. Doucet v Doucet (1974), 47 D.L.R. (3d) 22 (Ont. H.C.), where the question asked was "Where is the petitioner's real home?" See also Girardin v Girardin (1973), 42 D.L.R. (3d) 294 (Sask. Q.B.), where the notion of "home base" was used.


43. See Stransky v Stransky, n. 40, supra.


45. N. 42, supra.


48. Ibid., 224.

49. Ibid.


51. Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 46(1).

52. Houlden J. in Hardy v Hardy, n. 35, supra, adopted this statement in formulating the test "Where did this petitioner regularly, normally, or customarily live in the year preceding the filing of the petition?"


54. N. 35, supra.

55. N. 42, supra.

56. N. 42, supra.


58. Ibid., 318.
60. (1975), 21 R.F.L. 370 (Sask. Q.B.).
62. N. 35, supra.
63. N. 61, supra.
65. Ibid., 36-7. The Court in the Nowlan case, ibid., referred to this quote as a statement of law which has been "universally adopted in all subsequent cases in England." This is not true: see Stransky v Stransky, n. 40, supra.
66. N. 61, supra.
67. N. 64, supra.
68. Compare Zoldester v Zoldester, n. 57, supra, 318: see p. 30, infra.
69. N. 61, supra.
70. (1970), 2 R.F.L. 67 (N.S.S.C.), which refers to Hull v Hull, an earlier unreported decision by the same judge.
71. N. 35, supra.
72. N. 42, supra.
73. N. 40, supra.
75. Hopkins v Hopkins, ibid.
76. Hopkins v Hopkins, ibid., as interpreted by Karminski J., in Stransky v Stransky, n. 40, supra.
77. See: Hardy v Hardy, n. 35, supra; Marsellus v Marsellus, n. 42, supra; Thomson v M.N.R., n. 47, supra, Levene v I.R.C., n. 50, supra, 232; I.R.C. v Lysaght, n. 50, supra, 243, 248; Stransky v Stransky, n. 40, supra; and see Re Bauer (1976), 10 N.R. 93 (Fed. C.T.D.), an immigration case.
78. N. 40, supra.
79. Ibid., 437.
80. Matrimonial Causes Act 1950 (14 Geo. 5, c. 25), s. 18(1)(b).
81. N. 70, supra.
82. In fact the court indicated that the intention argument used by counsel would have been more appropriate had the issue been one of domicile.
84. N. 64, supra.
85. N. 61, supra.
86. N. 70, supra.
87. N. 74, supra.
89. N. 70, supra.
91. Although the court concurred as to the meaning of ordinary residence, Dubin and Blair J.J.A. did not agree with Evans J.A.'s interpretation of "actual residence."
92. Including Macrae v Macrae, n. 64, supra, Hardy v Hardy, n. 35, supra, Girardin v Girardin, n. 83, supra.
93. N. 35 and 59, supra, respectively.
94. Contrast Zawatsky v Zawatsky, n. 60, supra.
96. N. 88, supra.
97. Stevenson J. said "This is one of the problems for which Parliament has not prescribed, and the courts cannot prescribe, a hard and fast rule. Each case must be decided on its own facts." See n. 88, supra.
98. N. 57, supra.
99. See Doucet v Doucet, n. 59, supra, Marsellus v Marsellus, n. 42, supra.

100. See Robichaud v Robichaud, n. 88, supra, MacPherson v MacPherson, n. 90, supra.


102. The court did find that the petitioner had not lost her ordinary residence in Nova Scotia during her short absence.

103. E.G. Hardy v Hardy, n. 35, supra, Marsellus v Marsellus, n. 42, supra, Zoldester v Zoldester, n. 57, supra, Doucet v Doucet, n. 59, supra.

104. Nowlan v Nowlan, n. 70, supra, Graves v Graves, n. 101, supra.

105. E.G. Hardy v Hardy, n. 35, supra, Marsellus v Marsellus, n. 42, supra, Zoldester v Zoldester, n. 57, supra.

106. E.G. Cullen v Cullen, n. 61, supra, MacPherson v MacPherson, n. 90, supra, Robichaud v Robichaud, n. 88, supra.


108. Marsellus v Marsellus, n. 42, supra, Doucet v Doucet, n. 59, supra.

109. Robichaud v Robichaud, n. 88, supra.


111. N. 74, supra.

112. Estey J. in Thomson v M.N.R., n. 47, supra, 232, said, "It is well established that a person may have more than one residence ..." and see Kellock J., ibid., 229.

113. E.G. Hardy v Hardy, n. 35, supra, Wood v Wood, n. 95, supra.

114. E.G. Nowlan v Nowlan, n. 70, supra, Girardin v Girardin, n. 83, supra.


115. As in MacPherson v MacPherson, n. 90, supra, Robichaud v Robichaud, n. 88, supra, Nowlan v Nowlan, n. 70, supra, Cullen v Cullen, n. 61, supra, Girardin v Girardin, n. 88, supra.
116. See Girardin v Girardin, n. 88, supra, Lotoski v Lotoski, n. 53, supra, Nowlan v Nowlan, n. 70, supra; contrast Wood v Wood, n. 95, supra.

117. See Hardy v Hardy, n. 35, supra, Doucet v Doucet, n. 59, supra, Marsellus v Marsellus, n. 42, supra, Zoldester v Zoldester, n. 57, supra, contrast Nowlan v Nowlan, n. 70, supra.

118. See Wood v Wood, n. 95, supra, Hardy v Hardy, n. 35, supra; but see Norton v Norton (1970), 14 D.L.R. (3d) 489 (N.S.S.C.), where the court held the petitioner to be actually resident in Nova Scotia despite the fact that he was on the high seas at the time in question.

119. See Hardy v Hardy, n. 35, supra.

120. N. 95, supra.

121. Marsellus v Marsellus, n. 42, supra, Doucet v Doucet, n. 59, supra; approved in Girardin v Girardin, n. 83, supra; MacPherson v MacPherson, n. 90, supra.


123. N. 35, supra.

124. See Norton v Norton, n. 118, supra, which indicates that the Hardy case would have been followed but for a distinction on the facts.


126. N. 42, supra.

127. In Doucet v Doucet, n. 59, supra.

128. Ibid., 25.

129. N. 90, supra.

130. Compare Dubin J.A. in MacPherson v MacPherson, ibid., 120.


132. Ibid.


134. See Mendes da Costa, 2, Studies in Canadian Family Law (1972) Ch. 16, 944.

135. N. 131, supra.
136. P. 51, infra.

137. This view is shared by Mendes da Costa, see Studies in Canadian Family Law, ibid., 946; see also Thornton v Thornton (1886), 11 P.D. 176 (C.A.); Sealey v Callan, [1953] 1 All E.R. 942.

138. For British Columbia, see Rule 3(2) of the Divorce Rules and Rule 19(24) of the Rules of Court.


140. See Johnson v Johnson (1979), 27 O.R. (2d) 698.


144. St. Pierre v South American Stores Ltd., [1936] 1 K.B. 382, 398 (C.A.) followed in Sittler v Conwest Exploration Co. Ltd. (No. 2) (1972), 31 D.L.R. (3d) 201 (Y.T.); and for a matrimonial case where a stay was not granted even though it would have proved more convenient and less expensive, see Thornton v Thornton, n. 137, supra.

145. Ibid.


147. Ibid., 812.

FOOTNOTES

CHAPTER 3


2. See s. 20 of the Matrimonial Proceedings Act 1963, no. 71.


4. See p. 11, supra.

5. See p. 14, supra.

6. See p. 8, supra.

7. See p. 9, supra.


10. See n. 1, supra.

11. See s. 4(3)(a) of the Family Law Act 1975-6, n. 1, supra.

12. See p. 8, supra.

13. See s. 4(3)(c) of the Family Law Act 1975-6, ibid.

14. See p. 16, supra.

15. N. 13, supra.


18. This was pointed out in Niboyet v Niboyet (1878), 4 P.D. 1 (C.A.).

20. See p. 12, supra.
21. See p. 11, supra.
22. See p. 44, supra.
25. See s. 39(3)(c) of the Family Law Act 1975-6, n. 1, supra.
26. See the analysis in the previous chapter, p. 18, supra.
27. Law Commission, Working Paper No. 28, para. 64.
29. Per Lane J., Cruse v Chittum, [1974] 2 All E.R. 940; see also Hall (1975), 24 I.C.L.Q.I.
33. See the analysis in the previous chapter, p. 18, supra.
34. At the time of writing this work, Cruse v Chittum, n. 29, supra, appears to be the only case dealing with "habitual residence".
35. See Cruse v Chittum, ibid.
36. See s. 39(3) of the Family Law Act 1975-6, n. 1, supra.
37. See s. 5(2) of the Domicile and Matrimonial Proceedings Act 1973, n. 1, supra.
38. See n. 19, supra.
39. See n. 37, supra.
40. See n. 36, supra.
41. See generally the materials referred to in n. 19, supra.


45. Recognition of foreign divorces in Canada is the subject of Part II of the thesis.

46. See s. 3(1)(b) of the Recognition of Divorces and Legal Separations Act 1971, c. 53 (England), s. 82(1)(b)(ii) of the Matrimonial Proceedings Act 1963, no. 71, (New Zealand).

47. See generally n. 19, *supra.*

48. See the analysis of Canadian provisions in the previous chapter, p. 35, *supra.*


50. N. 1, *supra.*

51. See Nygh, Turner: The Family Law Service (Australia), Service No. 24, 3031.

52. In the Marriage of Cobbin, 1 Fam. L.N. no. 14.

53. S. 45(2) of the Family Law Act 1975-6, n. 1, *supra.*

54. Pilkington v Pilkington, 2 Fam. L.R. 11, 639.


FOOTNOTES

CHAPTER 4

INTRODUCTION

2. 1969 1 A.C. 33 (H.L.).
3. C. 53.

THE COMMON LAW

3. See the Recognition of Divorces and Legal Separations Act 1971, c. 53.
4. Harvey v Farnie (1882), 8 App. Cas. 43 (H.L.); Le Mesurier v Le Mesurier, 1895 1 A.C. 517; also Wood v Wood, 1957 P. 254.
7. E.G. Harvey v Farnie, n. 4, supra.
10. But see Schwebel v Ungar, 1965 S.C.R. 148 (S.C.C.) where an Italian "gett" divorce was recognized in Canada although the parties did not acquire a domicile in a country which recognized the decree until a few weeks after the divorce was obtained; see p. 61, infra.
11. N. 8, supra, 141.


15A. By s. 6(2) of the Divorce Act, n. 6, supra, the wife's domicile is now to be determined separately for recognition purposes, see p. 86, infra.

16. N. 15, supra.

17. Robertson J.A. also stated that the respondent in the Walker case, ibid., could not attack the foreign divorce collaterally since he was not a party to the foreign proceedings.

18. Wyllie v Martin, n. 15, supra.


21. N. 10, supra; see Lysyk, n. 12, supra.


24. N. 12, supra.

25. See Lysyk, n. 12, supra.


27. See s. 13 Matrimonial Causes Act 1937 c. 57 (deserted wife legislation); s. 1 Law Reform (Misc. Prov.) Act 1949 c. 100 (jurisdiction on the basis of three years' residence) (both repealed), see p. 7, supra.
28. S. 16(a) New South Wales Matrimonial Causes Act 1899 No. 14 provided:

Any wife who at the time of the institution of the suit has been domiciled in New South Wales for three years and upwards (provided she did not resort to New South Wales for the purpose of such institution) may present a petition to the court praying that her marriage may be dissolved on one or more of the grounds following: (a) that her husband has without just cause or excuse wilfully deserted the petitioner and without any such cause or excuse left her continuously so deserted during three years and upwards and no wife who was domiciled in New South Wales when the desertion commenced shall be deemed to have lost her domicile by reason only of her husband having thereafter acquired a foreign domicile.

29. N. 27, supra; s. 13 provided:

Where a wife has been deserted by her husband, or where her husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled in England and Wales, the court shall have jurisdiction for the purpose of any proceedings under Part VIII of the principal Act notwithstanding that the husband has changed his domicile since the desertion or deportation.

30. Jenkins L.J. dissented on the ground that the husband never acquired a domicile in New South Wales.

31. N. 26, supra.

32. Ibid., 257.

33. Travers v Holley was followed e.g. in Arnold v Arnold, [1957] P. 237;

34. Also discussed in Indyka v Indyka, see p. 76, infra.


36. Ibid., 364, and see Mr. Commissioner Latey in Arnold v Arnold, n. 33, supra, 253.

37. Dunne v Saban, n. 33, supra, approved in Robinson-Scott v Robinson-Scott; Mountbatten v Mountbatten, Levett v Levett and Smith, all at n. 33, supra; see also Manning v Manning, n. 33, supra.

38. See Dunne v Saban, ibid., where the wife had been resident in Florida for approximately two years before the divorce, but the divorce was not recognized in England; also Mountbatten v Mountbatten, ibid., where it was said that the situation in the foreign jurisdiction must be strictly analogous to the basis on which English courts could assume jurisdiction.

39. N. 33, supra, followed in Manning v Manning, n. 33, supra; see also Arnold v Arnold.

40. 14 Geo 6, c. 25(repealed).

41. Contrast Dunne v Saban, n. 33, supra, where David J. took into account the fact that jurisdiction in Florida was founded on bona fide residence for at least ninety days, even though the wife had in fact been a Florida resident for at least two years.

42. See Tijanic v Tijanic, n. 33, supra.

43. Tijanic v Tijanic, ibid.

44. Levett v Levett and Smith, n. 33, supra.

45. See n. 27, supra.

46. N. 33, supra.

46A. See Viccari v Viccari, n. 14, supra.
47. Ibid., 84; contrast Kennedy (1954), 32 Can. Bar Rev. 359.


49. 1 A.C. 33, p. 76, infra.


50A. N. 10, supra.


52. (1965), 49 D.L.R. (2d) 675 (Ont. C.A.) (a nullity case); see also Re Needham v Needham (1964), 43 D.L.R. (2d) 405 (Ont. H.C.) a case, concerning the enforcement of a maintenance order from England, which approved Travers v Holley; Bevington v Hewitson (1974), 47 D.L.R. (3d) 510 (Ont. H.C.).

53. N. 51, supra.


55. See p. 66-7, supra.

56. Harvey v Farnie, n. 4, supra, Janusciwicz v Janusciwicz, n. 50, supra.


58. N. 51, supra.

59. See Warden v Warden, n. 33, supra.

60. See The Divorce Jurisdiction Act 1930 c. 15 (repealed), p. 6, supra.


62. N. 60, supra.

63. See Schwebel v Ungar, n. 10, supra.

64. See n. 60, supra.

65. E.G. La Pierre v Walter, n. 57, supra.
FOOTNOTES

1967 - 71 ENGLAND - INDYKA v INDYKA


4. C. 100 (repealed), see p. 7, supra.

5. See p. 64, supra.


8. N. 1, supra.

9. Ibid., Lord Reid, 68; Lord Morris, 76; Lord Pearce, 86; Lord Wilberforce, 103; Lord Pearson, 109.

10. Ibid., Lord Wilberforce, 97.

11. The domicile test was first adopted precisely to preclude such scandals, see the extract of Lord Penzance's judgment in Wilson v Wilson (1872) L.R. 2 P. + D. 435, 442, which was approved wholeheartedly in Le Mesurier v Le Mesurier, [1895] A.C. 514, 540.

12. N. 1, supra, Lord Pearson, 108.

13. Ibid., Lord Pearce, 77.


15. Ibid., Lord Morris, 76; Lord Pearce, 83; Lord Wilberforce, 103; Lord Pearson, 108.

16. Ibid., Lord Reid, 65; Lord Pearce, 85.
17. Ibid., 110.
18. Ibid., 68.
19. Ibid., 90.
20. Ibid., 104.
21. Ibid., 112.
22. Ibid.
23. Ibid., 68.
24. Ibid., 105.
25. Ibid.
26. Ibid., 76.
27. Ibid., 111.
28. Ibid., 76.
29. Ibid., 87.
30. Ibid., 105.
31. Ibid., 77.
32. Ibid., 111.
33. Ibid., 88.
34. See p. 113, infra.
35. Lord Pearce, n. 33, supra.
36. The words of Mr. Commissioner Latey in Arnold v Arnold, [1957] P. 237, 253, used by Lord Pearson, n. 1 supra, 112.
37. See p. 67, supra.
38. See p. 58, supra.
39. See n. 15, supra.
40. N. 1, supra, 90, 104, respectively.
41. See p. 64, supra.
42. The words of Webb; for a detailed discussion see his article, *The Old Order Changeth - Travers v Holley Reinterpreted*, n. 2, *supra*.

43. N. 1, *supra*, Lord Pearce, 85; Lord Morris, 75; Lord Pearson, 110; see p. 64, *supra*.

44. *Ibid.*, 57; see also Lord Wilberforce, 106.


47. See p. 67, *supra*.


49. N. 1, *supra*.

50. E.G. Mather v Mahoney, [1968] 3 All E.R. 223; Mayfield v Mayfield, [1969] P. 119; but see Turczak v Turczak, [1970] P. 198, where recognition of divorce obtained by the husband was conceded by the wife without argument on the Indyka principle.

51. N. 1, *supra*, 106.

52. See North, Recognition of Foreign Divorce Decrees, n. 2, *supra*.


56. See Davidson v Davidson, [1969] 113 Sol. Jo. 813, where the Nevada decree was not recognized, when it was obtained after almost a year's residence in the United States, but only six week's residence in Nevada.


59. See p. 74, *supra*; also Welsby v Welsby, n. 55, *supra*.

60. N. 55, *supra*.

62. See Alexander v Alexander, n. 54, supra, where Karminski J. also took into account the wife's continued residence in Columbia after she had obtained the divorce.

63. N. 50, supra.

64. See p. 59, supra.

65. Not followed in Davidson v Davidson, n. 56, supra.


68. N. 66, supra, 338.

68A. Contrast Davidson v Davidson, n. 56, supra.

69. (1968), 31 M.L.R. 257. North was speaking of the retrospective application of Travers v Holley, p. 64, supra, but the argument is equally applicable to the real and substantial connection test.

70. See p. 58, supra.

71. N. 69, supra.

72. Ibid., 264.

73. Presumably, if the validity of the divorce had been decided in a court of law in England, the matter would be res judicata, and the declaration presumably would be conclusive as to the parties' status.

74. E.G. Mather v Mahoney, n. 50, supra, Alexander v Alexander, n. 54, supra, Welsby v Welsby, n. 55, supra.

75. N. 50, supra.

76. Ibid., 121, see also Turczak v Turczak, n. 50, supra.

77. N. 55, supra.

78. Ibid., 225.

79. N. 53, supra.

80. N. 1, supra, 88.

81. N. 50, supra.
82. C. 72(repealed); see now s. 27 of the Matrimonial Causes Act 1973, c. 18.

83. Ibid., s. 22 provided (relevant parts underlined):

   22.(1) Where -
   (a) a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or any child to whom this subsection applies; and
   (b) the court would have jurisdiction to entertain proceedings by the wife for judicial separation then, without prejudice to the provisions of s. 35(2) of this Act the court may on the application of the wife order the husband to make her such periodical payments as may be just.

84. By s. 24 of the Matrimonial Causes Act 1973, c. 18, the court has power to make property and maintenance orders "on granting a decree nisi of divorce," either "before or after the decree is made absolute." This would prohibit the court from granting relief under the Act, if the divorce was obtained abroad.


86. Dicey and Morris, The Conflict of Laws, 9th Ed. 258 et seq., contrast the views of Cheshire which support the "intended matrimonial Home" theory, Cheshire's Private International Law, 9th Ed. 355.

87. However, if one of the parties to the proposed remarriage was domiciled in England, the rule in Sottomayor v De Barros (No. 2) (1879), 5 P.D. 94, may apply so that capacity to remarry may not be affected by any incapacity which the other party has by the law of his domicile and which does not exist in English law.

88. [1968] 2 Q.B. 956, more recently contrast Perrini v Perrini, [1979] Fam. 84.

89. E.G. Mather v Mahoney, n. 50, supra, Mayfield v Mayfield, n. 50, supra.
CHAPTER 5

1. See Chapter 2, supra.


3. See p. 95, infra.


7. See p. 132, infra.

8. See Schwebel v Ungar, n. 6, supra.

9. Pemberton v Hughes, 1899 1 Ch. 781; see p. 114, infra.

10. MacNeill v MacNeill, n. 4, supra, Bevington v Hewitson, n. 4, supra.

11. Ibid.

12. See p. 79, supra.

13. N. 4, supra.


15. P. 71, see p. 67, supra.

16. N. 4, supra.

17. See generally Chapter 2.


19. N. 15, supra.
20. Bevington v Hewitson, n. 4, supra, approving dictum in Rowland v Rowland, n. 4, supra; Jani v Jani (1975), 20 R.F.L. 361 (Ont. S.C.), Bate v Bate (1978), 1 R.F.L. (2d) 298 (Ont. S.C.); contrast Abbruscato v Abbruscato (1973), 12 R.F.L. 257 (Ont. Prov. C.), where Indyka was applied, but the court said that it may be precluded, by s. 6(2) of the Divorce Act, from so doing in divorce proceedings.

21. Ibid. See also Bate v Bate, ibid.


25. E.G. Bevington v Hewitson, n. 4. supra.

26. See Pemberton v Hughes, n. 9, supra.


30. Compare Hornett v Hornett, 1971 1 All E.R. 98, where a French divorce was recognized because no injustice would have been caused by the declaration of validity of the decree; Meyer v Meyer, 1970 1 All E.R. 378, where Bagnall J. looked to the justice of the case to refuse recognition of a German divorce, which was obtained by duress during the second world war.


32. See p. 95, infra.


35. Ibid. Contrast Jani v Jani, n. 20, supra, where the Indyka case was applied in Ontario after the Seagull case; see also Keresztessy v Keresztessy, 1976 14 O.R. (2d) 255, Bate v Bate, n. 20, supra, Haut v Haut (1978), 3 R.F.L. (2d) 239 (Ont. S.C.).
36. N. 22, supra.

37. N. 34, supra.

38. N. 34, supra.

39. See p. 149, infra.


41. See p. 77, supra.

42. Re Kish and the Director of Vital Statistics, n. 40, supra.

43. Bevington v Hewitson, n. 4, supra.


45. Holub v Holub, n. 33, supra.

46. N. 4, supra.

47. N. 4, supra.

48. N. 40, supra.

49. Re Kish and the Director of Vital Statistics, n. 40, supra.

50. Compare Kish, ibid., where the court took into account that jurisdiction in the foreign country was not founded through any "flimsy residential means," before applying the test to a wife, who had lived most of her life in Hungary, the husband having returned there from Alberta to obtain a divorce; contrast Monnin J.A. in Holub v Holub, p. 98, infra.
52. See p. 77, supra.
53. N. 4, supra.
54. N. 34, supra.
55. N. 28, supra.
56. N. 34, supra.
57. N. 34, supra.
58. P. 96, supra.
59. See MacNeill v MacNeill, n. 4, supra, Bevington v Hewitson, n. 4, supra, 515, Haut v Haut, n. 35, supra; compare Monnin J.A. in Holub v Holub, n. 33, supra, 530.
60. N. 33, supra, 530.
61. N. 35, supra.
62. N. 4, supra, 510.
63. N. 35, supra, 530.
64. See also La Carte v La Carte, n. 4, supra, where residence up to the date of the decree was taken into account. Of course, there was an error on the part of Monnin J.A. in respect of the domicile test, the relevant time for which is the date of filing the petition: Harvey v Farnie (1882), 8 App. Cas. 43 (H.L.), Weston v Weston (1971), 24 D.L.R. (3d) 109 (B.C.S.C.).
66. See Re Kish and the Director of Vital Statistics, n. 40, supra.
68. N. 35, supra, 259.
69. See Chapter 2.
70. N. 35, supra.
72. (1968) 3 All E.R. 223, see p. 78, supra.

73. Hassan v Hassan, n. 34, supra.

74. Ibid.

75. Ibid., 148.

76. E.G. Re Kish and the Director of Vital Statistics, n. 40, supra, (husband petitioner, wife respondent's connection); Holub v Holub, n. 33, supra, Haut v Haut, n. 35, supra, (husband petitioner's connection); see also Bevington v Hewitson, n. 4, supra, Powell v Cockburn, p. 90, supra; contrast MacNeill v MacNeill, n. 4, supra, where Winter L.J.S.C. seemed to misconstrue the interpretation of Lacourciere J. in Bevington v Hewitson and said that the test required a real and substantial connection between the petitioner and the granting jurisdiction.

77. See p. 82, supra.

78. See p. 159, infra.

79. N. 4, supra.

80. See p. 79, supra.

81. See p. 84, supra.

82. See Perrini v Perrini, [1979] Fam. 84; contrast R v Brentwood Superintendent Registrar of Marriages, [1968] 2 Q.B. 956, p. 84, supra.

83. For the conflicts rules as to capacity to remarry, see Dicey and Morris, The Conflict of Laws, 9th Ed., 258; contrast the views expressed in Cheshire's Private International Law, 9th Ed. 355.

84. E.G. as in R v Brentwood Superintendent of Marriages, n. 82, supra.

85. N. 71, supra.

86. [1953] P. 246 (C.A.), see p. 64, supra.

87. See e.g. Bate v Bate, n. 20, supra, 303.

88. See e.g. Powell v Cockburn, n. 22, supra, where the possibility that the husband had acquired a domicile in the United States as a whole was not considered; Re Reid and Reid, n. 34, supra, Re Jones, n. 34, supra, Seagull v Seagull, n. 34, supra; contrast Wood v Wood, n. 40, supra, where the court took into account the fact that a domicile had not been acquired in Utah or the United States as a whole, before applying the Indyka test.
90. 1959 P. 43, see p. 67, supra.
91. See e.g. Bate v Bate, n. 20, supra, 304; see also n. 50, supra.
92. 1977 Fam. L.R. 11, 351.
93. No. 53 of 1975.
94. See p. 90, n. 20, supra.
95. See s. 6 of the Recognition of Divorces and Legal Separations Act 1971, c. 53, as amended by s. 2 of the Domicile and Matrimonial Proceedings Act 1973, c. 45.
96. N. 86, supra.
97. See p. 69, supra.
98. C. 15, see p. 6, supra.
100. N. 4, supra.
101. Ibid., 515.
102. For a comment on this aspect of Bevington v Hewitson, ibid., see McLeod, (1976) 64 Can. Bar Rev. 169, who sees difficulty in the continued use of the Divorce Jurisdiction Act, n. 98, supra, if s. 6(2) is used retrospectively. This may be due to his misconception of the word "retrospective," as he indicates that by definition it "implies the eradication of all that existed in the same area previously," ibid., 173, which, of course, it does not.
103. See p. 90, supra.
104. For an argument for retroactivity, see p. 79, supra.
105. See generally Chapter 2.
106. N. 4, supra, 515.
107. See p. 103, supra; Schwebel v Ungar, n. 6, supra.
108. See n. 83, supra.
109. See p. 84, 103, supra.
110. See North, Recognition of Foreign Divorce Decrees (1968), 31 M.L.R. 257, p. 79, supra.
111. See e.g. Lord Morris, 1 A.C. 33, 86, Lord Wilberforce, ibid., 106.

112. N. 6, supra.


116. Hassan v Hassan, n. 34, supra.

117. See p. 56, supra.

118. See p. 58, supra.

119. See p. 87, supra.

120. N. 15, supra.

121. N. 86, supra.

122. See p. 90, supra.

123. See p. 103, supra.

124. Ibid.

125. P. 87, supra.

126. Bevington v Hewitson, n. 4, supra.

127. N. 85, supra.

128. See generally Part 111.

129. See R v Brentwood Superintendent Registrar of Marriages, n. 82, supra.

130. Wood v Wood, n. 40, supra.

131. See e.g. Monnin J.A. in Holub v Holub, p. 98, supra.

132. See p. 5, supra.

133. See p. 87, supra.

134. See e.g. North, Recognition of Foreign Divorce Decrees (1968), 31 M.L.R. 257.

136. N. 85, supra.

137. P. 101, supra.

138. See Powell v Cockburn, n. 22, supra, p. 90, supra.

139. P. 108, supra.

140. P. 57, supra.


142. N. 92, supra.

143. N. 35, supra.

144. See p. 90, supra.

145. See the case referred to in n. 34, supra.

146. See p. 5, supra.

147. See p. 54, supra.

148. N. 85, supra.

149. See Viccari v Viccari, n. 89, supra.

150. See p. 71, supra.

151. See p. 87, supra.

152. See Powell v Cockburn, n. 22, supra, p. 90, supra.

153. See p. 56, supra.

154. C. 53.
FOOTNOTES

GROUND FOR ATTACKING A FOREIGN DIVORCE (Continuation of Chapter 5)


4. Ibid.

5. See Pemberton v Hughes, n. 2, supra, 790; Powell v Cockburn, n. 2, supra.

6. See Bater v Bater, n. 2, supra.

7. See Pemberton v Hughes, ibid., Middleton v Middleton, n. 2, supra; compare Rothwell v Rothwell, n. 3, supra, Delaporte v Delaporte, n. 3, supra.

8. See p. 116, infra.

9. Pemberton v Hughes, n. 2, supra; Bater v Bater, n. 2, supra; Bonaparte v Bonaparte, [1893] P. 402; Crowe v Crowe (1937), 157 L.T. 557; Powell v Cockburn, n. 2, supra; see also Lyon v Lyon, n. 3, supra.

10. Ibid.

11. The divorce was also obtained by collusion of the spouses and the co-respondent.

12. N. 2, supra, 169.

13. N. 2, supra, 790.

14. Contrast Terrell v Terrell, [1971] A.L.R. 146, where the Supreme Court of Victoria held, inter alia, that a Washington divorce should not be recognized because the petitioner in the foreign proceedings had not, in fact, been resident in Washington for the required period of time under Washington law; compare Middleton v Middleton, n. 2, supra, where the fraud which was
perpetrated on an Illinois court as to its own residence requirements, combined with other falsifications, was held to amount to a substantial injustice; see p. 117, infra.


17. In Middleton v Middleton, n. 2, supra, it was held that a substantial injustice had occurred.

18. See Pemberton v Hughes, n. 2, supra.


20. E.G. Bavin v Bavin, n. 3, supra; Rothwell v Rothwell, n. 3, supra; Maday v Maday, [1911] 16 W.L.R. 701 (Sask); Terrell v Terrell, n. 14, supra; Macalpine v Macalpine, [1957] 3 All E.R. 134.


22. Fields v Fields, [1923] 2 D.L.R. 256; see also Pemberton v Hughes, n. 2, supra.


24. N. 3, supra.


27. Rothwell v Rothwell, n. 3, supra, Dicey and Morris, n. 22, supra, 1034; Middleton v Middleton, n. 2, supra; Macalpine v Macalpine, n. 20, supra.

28. See Hornett v Hornett, n. 21, supra.

29. N. 2, supra, 173.

30. Pemberton v Hughes, n. 2, supra; Salvesen v Austrian Property Administrator, [1927] All E.R. 78; Macalpine v Macalpine, n. 20, supra; Middleton v Middleton, n. 2, supra.
31. See *Macalpine v Macalpine*, ibid.
32. N. 2, supra.
33. See e.g. *Bater v Bater*, n. 2, supra; p. 113, supra.
34. Ibid.
35. See *Pemberton v Hughes*, n. 2, supra; *C v C*, n. 3, supra.
36. See *Harvey v Farnie* (1882), 8 App. Cas. 43 (H.L.); *Bater v Bater*, n. 2, supra.
39. N. 26, supra.
41. *C v C*, n. 3, supra; contrast dicta in *Powell v Cockburn*, n. 2, supra, 167, which speaks of collusion or fraud going to jurisdiction.
42. N. 9, supra.
43. See also *Powell v Cockburn*, n. 2, supra; *Bater v Bater*, n. 2, supra.
44. Contrast *Bater v Bater*, ibid., where it was held that fraud and collusion per se are insufficient grounds for refusing recognition.
45. N. 21, supra, 103; see Karsten (1971), 34 M.L.R. 450.
46. See p. 116, supra.
47. See p. 115, supra.
50. See *El Oueik v El Oueik*, ibid.
51. See p. 115, infra.
52. [1976] 14 O.R. (2d) 255; see p. 98, supra.
53. C. 53, see p. 121, infra.
3. See para. 29 Law Com. No. 34.
7. The United Kingdom means Northern Ireland, England, Scotland and Wales: see notes to ss. 1 and 10 of the 1971 Act.
8. S. 8 contains the grounds of attack of divorce decrees, see p. 128, infra.
9. S. 1 of the 1971 Act, as amended by s. 15 of the Domicile and Matrimonial Proceedings Act 1973, c. 45. British Isles Means the United Kingdom (see n. 7, supra), the Channel Islands and the Isle of Man.
11. Ibid., s. 14.
12. See p. 132, infra.
13. The problems which have occurred with this definition in the context of extra-judicial divorces are discussed at p. 135, infra.
14. S. 8 contains the bars to recognition, see p. 128, infra.
15. S. 3(1)(a) and (b) of the 1971 Act, respectively.
16. See p. 47, supra.
17. S. 3(3) of the 1971 Act.
18. See North, n. 6, supra, 43.

20. See p. 122, supra.

21. S. 3(3) of the 1971 Act. This complies with article 14(1) of the Hague Convention on Recognition of Divorces and Legal Separations, which was inserted at the request of the United States, see Nadelmann, n. 19, supra, 775.


23. This effectively gave the wife fifteen days to appeal.

24. A finding of fact, in foreign proceedings, including nationality is conclusive evidence of the fact found if both parties appear in the proceedings; see s. 5(1)(a) and (2) of the 1971 Act.

25. The problem of lack of financial protection after a foreign divorce is the topic of Part III.

26. N. 22, supra.

27. For over a century there has been considerable controversy between the "nationality" and "domicile" concepts. The "nationality concept first emerged in Article 3(3) of the French Code Napoleon 1803 and was further propounded by the Italian professor Mancini, around 1851. In an unpublished investigation in 1968 by the Centre for Foreign Law and Private International Law of the University of Amsterdam, out of 108 countries, approximately 1450 million people were subject mainly to the domicile principle and approximately 1600 million to the nationality principle, see de Winter, n. 19, supra.

28. See Nadelmann, n. 19, supra.

29. N. 19, supra, 483.

30. S. 3(1)(b).

31. S. 2(b).

32. Following e.g. Williams v North Carolina (No. 2) (1945), 325 U.S. 226.
33. See recommendation 1, p. 54, supra.

34. [1969] 1 A.C. 33 (H.L.), see p. 71, supra.


36. Ibid.

37. See p. 58, supra.

38. [1906] P. 135, see p. 59, supra.


40. Ibid.

41. Ibid., s. 6(2).

42. Ibid., s. 6(3)(a).

43. Ibid., s. 6(3)(b).

44. Ibid., s. 6(4).

45. See s. 5(2).


47. S. 5(1)(b).


49. Although a spouse who merely contested jurisdiction could not be said to be voluntarily submitting to the jurisdiction of the court: See Re Dulles Settlement (No. 2), [1951] Ch. 850, contrast Harris v Taylor, [1915] 2 K.B. 580.

50. As in the Downton case, n. 48, supra, where it would have been unfair to bind the wife to the Nevada court's finding of domicile.

51. See p. 84, supra.

52. See p. 79, supra.

53. See p. 82, supra; Part 111.
54. See s. 6(5) of the 1971 Act, as amended by the Domicile and Matrimonial Proceedings Act 1973, c. 45.

55. S. 7 of the 1971 Act.

56. S. 10(4) of the 1971 Act.


58. See p. 159, infra.

59. See Wood v Wood, [1957] P. 254, where it was held that a prior maintenance order could survive a foreign divorce; Torok v Torok, n. 22, supra.

60. [1972] 3 W.L.R. 830.

61. C. 18.

62. See the Matrimonial Causes Act 1973, c. 18: S. 23 empowers the court to make an order for financial provision "on granting a decree of divorce ... or at any time thereafter ..."; s. 27, the wilful neglect provision, speaks in terms of "husband" and "wife", and see s. 27(2) discussed in the text above.

63. See e.g. Vanderbilt v Vanderbilt (1957), 354 U.S. 416, where it was held that New York could order maintenance to be paid to a wife after a valid Nevada divorce had been granted; p. 161, infra.

64. With regard to extra-judicial divorces, see p. 132, infra.

65. See p. 113, supra.


67. See p. 115, supra.

68. N. 60, supra.

69. [1979] Fam. 93.

70. Ibid., 111.

71. S. 8(2)(b); see Joyce v Joyce, n. 69, supra, Quazi v Quazi, [1979] 3 All E.R. 897 (H.L.).

72. See Hornett v Hornett, [1971] 1 All E.R. 98, p. 118, supra, Newmarch v Newmarch, n. 60, supra. The word "manifestly" was included
because it was included in Article 10 of the 1968 Hague Convention in order to discourage some countries from excessive reliance on the public policy exception, see the note to s. 8 of the 1971 Act; also Dicey and Morris, The Conflict of Laws, 9th Ed. 326.

73. Ibid.

74. This seems to correspond with "substantial injustice" in the wider sense, see p. 116, supra.

75. Ibid.


77. Bater v Bater, [1906] P. 209, see p. 113, supra.


81. See p. 56, supra.


84. e.g. Norway and Denmark, see North, n. 6, supra, 40.


86. E.G. Japan, see North, n. 6, supra, 41.

88. See North, n. 6, supra, 36, n.2.
89. See Dicey and Morris, The Conflict of Laws, 9th ed. 327.
90. See Ahmed, n. 83, supra, 219.
91. Ibid., 34.
94. 1971 2 W.L.R. 518, following Har-Shefi v Har-Shefi, n. 87, supra; Russ v Russ, 1962 3 All E.R. 194; see Pearl, n. 82, supra, Hartley, n. 82, supra.
95. See generally: North, n. 6, supra; Polonsky, n. 82, supra; Gavells, n. 82, supra; Jaffey, n. 82, supra.
96. See North, n. 6, supra, 49.
97. Ibid.
98. Ibid.; see Quazi v Quazi, n. 71, supra.
99. See Quazi v Quazi, ibid.
100. See p.121, supra.
101. C. 45.
102. See s. 16(3).
103. See p. 132, supra.
104. See e.g. Simon P. in Qureshi v Qureshi, n. 94, supra.
105. See p. 137, infra.
106. See n. 95, supra, and the articles therein; also Dicey and Morris, n. 89, supra, 329.
107. For a more detailed discussion of "proceedings", see p. 136, infra.
108. This is possible under Muslim law, see Ahmed, n. 83, supra, 80.

111. See Canton, n. 82, supra.

112. See p. 121, supra.

113. See p. 134, supra.

114. See p. 132, supra.

115. N. 109, supra, see Canton, n. 67, supra.

116. N. 71, supra.

117. Ibid., Lord Fraser, 916.

118. See p. 125, supra.

119. N. 101, supra.

120. See p. 121, supra.

121. See p. 125, supra.


125. See p. 121, supra.

126. See p. 135, supra.

127. See s. 8 of the 1971 Act, p. 128, supra.

128. Ibid., s. 8(2)(a)(i).

129. Ibid., s. 8(2)(a)(ii).

130. Ibid., s. 8(2)(b).


132. See s. 8 of the 1971 Act, p. 128, supra.
133. See *Quazi v Quazi*, n. 71, *supra*; see also the general note to s. 8(2) which suggests that s. 8(2)(a) will not apply in the case of unilateral divorces.

134. See p. 71, *supra*.


136. See Chapter 7.
FOOTNOTES

CHAPTER 7


3. See p. 90, supra.


5. See p. 54, supra.


7. See p. 86, supra.

8. See p. 95, supra.

9. See p. 121, supra.

10. See p. 45, supra.

11. For objectives of recognition rules see p. 56, supra.

12. See p. 137, supra.

13. See p. 133, supra.

14. See p. 147, Keresztessy v Keresztessy, n. 6, supra.


16. N. 4, supra.

16A. This problem has in fact arisen in the context of Armitage v A-G, see p. 61, supra.

17. See p. 126, supra.

18. C. 53.

19. See p. 103, 84, supra.

20. As to capacity to marry generally, see Dicey and Morris, The Conflict of Laws, 9th Ed., 258.
21. See p. 79, supra.

22. See s. 10(4) of the Recognition of Divorces and Legal Separations Act 1971, c. 53.

23. See p. 113, supra.

24. See p. 128, supra.

25. See El Oueik v El Oueik, n. 6, supra.


27. See p. 128, supra.
FOOTNOTES

CHAPTER 8

INTRODUCTION

1. See p. 159, infra.
2. See p. 160, infra.
3. See p. 170, infra.

THE EFFECT OF AN UNRECOGNIZED FOREIGN DIVORCE - THE DOCTRINE OF PRECLUSION

1. Shaw v Gould (1868), L.R. 3 H.L. 55; but see Schwebe v Ungar, 1965 S.C.R. 148 (S.C.C.), a possible interpretation of which is that parties will be entitled to remarry after an invalid foreign divorce, if they subsequently acquire a domicile in a country which gives them capacity to do so.


4. Downton v Royal Trust Co., ibid., 450.

5. (1899), 31 O.R. 324 (Div. C.)

6. See Stevens v Fisk (1885), 8 L.N. 42, 53 (S.C.C.); however, this case was decided before Le Mesurier v Le Mesurier, 1893 A.C. 517 (H.L.) and the court in Stevens v Fisk was prepared to recognize the New York divorce on the basis of the wife's separate domicile or residence. Thus, Stevens v Fisk could not be regarded as good law after the Le Mesurier decision.

7. Ibid., 330.


9. Ibid., 334.

10. E.G. In Re Williams and the Ancient Order of United Workmen (1907),
11. (1926), 2 D.L.R. 129 (Sask. C.A.) Lamont J.A., 138:
"With all deference, I am of opinion that the real question here is, did the Iowa divorce have the effect of annulling the contract of marriage existing between the defendant and her husband, so far as this Province is concerned? If it did not, then it seems to me necessarily to follow that the defendant was Burnfiel's wife until his death, and consequently entitled to administer his estate after his decease. If, notwithstanding the divorce, Burnfiel and his wife in the eyes of Saskatchewan law were still man and wife, I fail to see how that relationship could be altered, or any right created by it could be affected by the fact that the defendant applied to the Iowa Courts for the divorce, or even by the fact that she obtained it by perpetrating a fraud on that Court. The only material question to my mind is, had the divorce the effect of annulling the marriage contract in this Province. The authorities, in my opinion, show conclusively that it could not have any such effect."


15. In Re Williams and the Ancient Order of United Workmen, n. 10, supra, Re Banks, n. 10, supra.


18. Ibid.

19. Ibid.

21. E.G. Seddon v Seddon and Doyle (1862) 2 Sw. & Tr. 640, where both parties had been guilty of adultery, and the husband guilty of wilful neglect conducing to the wife's adultery. In a petition for divorce brought by the husband Lord Penzance, in rather typical fashion, said of the wife:

"The petitioner has come before the court in a most unfavourable character. His conduct towards the unfortunate respondent was most heartless. Jealous by nature, that unhappy woman had her jealousy constantly kept alive by her husband, and at last threw herself into the arms of her seducer. She must take the consequence of her conduct. It will probably have a salutary effect on the interests of public morality, that it should be known that a woman, if found guilty of adultery, will forfeit, as far as this court is concerned, all right to the custody of, or access to her children. Even if I possessed the power (which I think I do not) to make an order giving the respondent access to her children, in such a case I should not make one."

22. The requirements for in personam jurisdiction in the United States are outlined in Weintraub, Commentary on the Conflict of Laws (1971), 93, 131.


27. E.G. In British Columbia a "spouse" includes a person whose marriage is null and void, and the court is to have regard to the same considerations as for a valid marriage when determining the question of maintenance. See s. 1 and s. 57 of the Family Relations Act R.S.B.C. 1979 c. 121.

28. Fromovitz v Fromovitz (1977), 79 D.L.R. (3d) 148; see also Buehler v Buehler, n. 17, supra, where it was not applied in respect of costs to be paid to the lawyer.


31. See Re Reid and Reid, ibid.

32. See MacDougall, 1, Studies in Canadian Family Law (1972), c. 6, 290; also n. 27, supra.

33. E.G. In British Columbia s. 2 of the Wills Variation Act R.S.B.C. 1979, c. 435, provides for an application by a testator's "wife" or "husband". It may be debated whether or not these words include persons who are party to a void marriage.

34. N. 23, supra.

35. (Newfoundland) No. 56.

36. See Swaizie v Swaizie, n. 5, supra, Stevens v Fisk, n. 6, supra, Royal Trust Co. v Jones, n. 13, supra.

37. Ibid.

38. Ibid.

39. However, the husband was domiciled in California when the Nevada proceedings were instituted and, although it was not decided whether the divorce should be recognized in British Columbia, perhaps the decree would have been pursuant to the principle in Armitage v A-G, [1906] P. 135.

40. Ibid., 451.

41. Conflict of Laws, 2d (1971) s. 74 and comment. S. 74 provides:

A person may be precluded from attacking the validity of a foreign divorce decree if, under the circumstances it would be inequitable to do so.

42. Compare Stevens v Fisk, n. 6, supra; contrast Re Lesserv Lesser, n. 10, supra.


44. Ibid.

45. N. 3, supra.
E.G. Rosswrom v Rosswrom, n. 17, supra, also Buehler v Buehler, n. 17, supra; contrast Nunn v Nunn, n. 20, supra.

See p. 153, supra.

See n. 32, supra.

See e.g. Burpee v Burpee, n. 16, supra.


E.G. Rosswrom v Rosswrom, n. 17, supra, Burpee v Burpee, n. 16, supra, see p. 151, supra.

See the comment to s. 74 of the American Law Institute's Second Restatement, n. 41, supra, which was approved in Downton v Royal Trust Co., ibid., and Re Jones, ibid.

The recommendations in respect of unrecognized foreign divorces are subject to a constitutional debate similar to the one outlined on p. 167, infra, in respect of recognized foreign divorces.

See p. 90, supra.

THE EFFECT OF A RECOGNIZED FOREIGN DIVORCE

1. See e.g. Holub v Holub, [1976] 5 W.W.R. 527 (Man. C.A.). However, there is a possibility that a party to a divorce would still be unable to remarry if he or she is under an incapacity to do so by the law of his or her domicile, see R v Brentwood Registrar of Marriages, [1968] 2 Q.B. 956, and Schwebel v Ungar, [1965] S.C.R. 148 (S.C.C.) as explained by Lysyk (1965), 43 Can. Bar Rev. 363; Contrast Perrin v Perrini, [1979] Fam. 84.

2. See e.g. Holub v Holub, ibid.


7. See e.g. in Saskatchewan, the Deserted Wives' and Children's Maintenance Act, R.S.S. 1978, c. D-26, in Newfoundland, The Maintenance Act, R.S. Nfld. 1970, c. 223. Although the Newfoundland act permits maintenance to be obtained, in certain circumstances, after a common law union, see s. 10 A of the Maintenance Act, ibid.

8. S. 22 of the Domestic Relations Act, R.S.A. 1980, c. D-37, provides for payments to be made after a decree of divorce or nullity.

9. By s. 1 of the Family Relations Act, R.S.B.C. 1979, c. 121 a "spouse" includes a person whose marriage was dissolved not more than two years before an application is made for family maintenance.

10. See The American Solution, infra.


13. Williams v North Carolina (No. 1), 317 U.S. 287. However, the state which exercises such jurisdiction must use a reasonable method of notice and give the other spouse a reasonable opportunity to be heard, see s. 69, American Law Institute, Restatement of Law, Second, Conflict of Laws.


15. However, the decree may be attacked collaterally on the point of jurisdiction. If a sister state finds that the spouse was not in fact domiciled in the decreeing state, recognition may be refused; see Williams v North Carolina (No. 2) (1945), 325 U.S. 226, Esenwein v Commonwealth (1945), 325 U.S. 279.
17. Ibid., 549.
19. See e.g. Schwarz v Schwarz (1963), 27 Ill. 2d 140, Pope v Pope, (1954), 2 Ill. 2d 152.
20. See e.g. Brown v Brown (1968), 249 Or. 274, Brady v Brady (1967), 151 W. Va. 900, and see the cases cited in Clark, n. 12, supra, 642.
22. (1965), 81 Nev. 235.
23. In the United States jurisdiction over persons may be exercised \textit{inter alia}, on the basis of presence, consent or appearance, or may be authorized by statute, see Weintraub, n. 12, supra, 93.
24. See s. 77(2) and comment, Second Restatement, n. 13, supra.
25. Ibid.
26. Estin v Estin, n. 16, supra; and see Weintraub, n. 12, supra, 185.
27. Estin v Estin, ibid.
28. Williams v North Carolina (No. 1), n. 13, supra.
30. Compare Blech v Blech, n. 21, supra.
31. Compare the facts of Downton v Royal Trust Co., ibid., see p. 154, supra.
32. (1976), 67 D.L.R. (3d) 624 (Alta. C.A.), although the divorce in that case was obtained in Canada.
33. Compare Rosswrom v Rosswrom (1914), 7 O.W.N. 583, p. 152, supra.
35. See MacDougall, 1, Studies in Canadian Family Law (1972), c. 6, 290, 292, 301.

37. See Rule 13(1)(q) of the Rules of Court of the Supreme Court of British Columbia.

38. See s. 5(1)(a) and (b) of the Divorce Act, ibid., s. 5(1)(b) also contains an "actual residence" requirement of at least ten months.


39A. See p. 53, supra.


41. Schibsby v Westenholz (1870), L.R. 6 Q.B. 155.

42. But there are other grounds for enforcement e.g. submission to the jurisdiction of the court, see Emanuel v Symon, [1908] 1 K.B. 302 (C.A.).

43. See ss. 14, 15 of the Divorce Act, n. 36, supra.

44. See p. 41, supra.

45. See n. 41, 42, supra.

46. See p. 162, supra.

47. 30 and 31 Vic. c. 3.

48. Ibid., s. 91(26).

49. Ibid., s. 92(13).


51. Ss. 10-12.

52. N. 32, supra.


54. See Vadeboncoeur v Landry (1976), 68 D.L.R. (3d) 155 (S.C.C.), where there was an interim order in existence before the decree nisi, and when the maintenance order was not made at the time of the decree nisi because of an omission or misunderstanding between counsel for the parties.
55. See Goldstein v Goldstein, n. 32, supra, where maintenance was later awarded because of the ex-spouses' changed circumstances.

56. Ibid.

57. See s. 11(2) of the Divorce Act.

58. See p. 163, supra.

59. Ss. 14, 15.

60. See p. 159, supra.


62. E.g. in British Columbia under the Family Relations Act, R.S.B.C. 1979 c. 121; in Ontario under the Family Law Reform Act, R.S.O. 1980 c. 152.

63. The provinces could also investigate the possibility of extending the "divisible divorce" doctrine to matrimonial property and the variation of wills as well as maintenance.

64. S. 11(1)(a) provides for maintenance orders payable by the husband.

65. S. 11(1)(b) provides for maintenance orders payable by the wife.

66. Custody orders which may be made ancillary to a divorce under the Act (see s. 11(1)(c) are not included in this recommendation because this would affect the rights of the children, and a further study would be necessary in order to determine whether or not it is appropriate or indeed necessary to incorporate custody matters in divisible divorce recommendations.

67. See s. 11(2).

68. See s. 14.

69. See s. 15.

70. See p. 135, supra.

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Mather v Mahoney, [1968] 3 All E.R. 223.
Mountbatten v Mountbatten, [1959] P. 43.

In Re Murray Estate (1921), 31 Man. R. 362 (K.B.).

Macalpine v Macalpine, [1957] 3 All E.R. 134.


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