when the child was kept away is the writ of **Habeas Corpus.** When the Court of Chancery developed a concurrent remedy its effect was to make the infant a ward of the Court of England. Hence the **lex fori,** the English law determined not only the exceptional power of the court to assume jursidiction but also the nature and extent of its exercise. Since the court represents the Sovereign, who is **parens patriae** the view was taken that courts in England had jurisdiction in matters of custody over British infants abroad. [See Hope v. Hope (1854), 4 De. G.M. & G. 328, Dwason v. Jav (1854) 3 De G.M. & G. 764, Re Willoughby (1885) 30 Ch.D. 324.] The jurisdiction of English courts in matters of custody of infants abroad who are British subjects is restricted to those who are citizens of the United Kingdom and Colonies and are domiciled in England. The jurisdiction of the English Court also extends if the infant is abroad and is a national and if the personal law is English Law (See Phillips v. Phillips (1944) W.N. 141; 60 T.L.R. 395—Re Luck (1940) Ch. 865 (908). However, the English courts only exercise this jurisdiction sparingly. [R. V. Sandback (1951) 1 K.B. 61; Harris v. Harris (1949) 2 A.E.R. 318, 322; Wakeham v. Wakeham (1954) 1 W.L.R. 366; Delp v. Deep—The Times—26-5-55.]

The Scottish law is the same. The court of the infants domicile has jurisdiction over him even when he is abroad. But in Scotland questions of political allegiance and protection are disregarded. [Hamilton v. Hamilton (1955) S.L.T. 16.]

The same appears to be the position in Canada and Australia (See Report of the International Conference, 1956, p. 414). Cer-r tain rules have been developed by the English courts governing custody of foreign nationals.

If no foreign custody order exists English courts will assume jurisdiction if the child is in England and make temporary orders. The English law is applied in such cases.

This subject was discussed at the 47th Conference of the International Law Association. The draft convention for custodianship was considered and is reproduced as Appendix IV.

Recommendations

It is suggested that this draft convention be adopted **mutatis mutandis.**

It is also suggested that the respective governments be advised to frame legislation in conformity with the views expressed by the Prague Convention of the International Law Association in 1947 for the mutual recognition of judgments in divorce and nullity of marriage subject to any variation.

APPENDIX I

LAW IN MEMBER STATES OF THE COMMITTEE

BURMA

In the Union of Burma so far as matters relating to marriage, inheritance, caste or religious matters and divorce are concerned, the laws applied by the courts are the "personal laws" of the parties. The said "perosnal laws" or Acts are to be found in Burma Code, Volume VI, 1944. But where one party is a Burmese Buddhist woman and the other is a non-Buddhist, then there is a separate enactment, viz. the Burmese Buddhist Women Special Marriage and Succession Act, 1954.*(1)*

In each case the religion of the party or parties concerned determine the applicability or otherwise of certain enactments. That is:

(a) Where both parties are Buddhists, the Burmese Buddhist Law applies.

(b) Where one or both of whom is, or are, a Christian or Christians, the Christian Marriage Act applies.

(c) In respect of Parsi residents of the Union, the Parsi Marriage and Divorce Act 1936 applies.

(d) Where both parties, being residents of the Union, are Hindu, Moslem, Parsi, Sikh or Jain, then their respective personal law is applied.

(e) Marriages may be celebrated under the Special Marriage Act between persons neither of whom professes the Christian or Jewish, or the Hindu, or the Mohammadan, or the Parsi, or the Buddhist, or the Sikh, or the Jain religion; or between persons each of whom professes one or the other of the following religions, viz. the Hindu, the Buddhist, Sikh or Jain.

Note: The Burma Divorce Act shall apply to all marriages contracted under this Act, and any such marriage may be declared null or dissolved in the manner therein provided, and for causes therein mentioned, or on the ground that it contravenes one or more of the conditions prescribed in clauses (1), (2), (3) or (4) of section 2 of this Special Marriage Act (Section 17 of the Act).

(f) Marriages may be celebrated under the Foreign Marriage Act between persons where, (1) either of the parties is a person

1 Act No. 32 of 1954. This Act repealed the Buddhist Women's Special Marriage and Succession Act.

professing the Christian religion; (2) neither of the parties is a person professing the Christian religion.

(g) Where one party is a Buddhist woman, namely, a woman belonging to one of the indigenous races of the Union who profess the Buddhist faith, or is the daughter of the parents who profess the Buddhist faith, *(2)* then the Burmese Buddhist Women Special Marriage and Succession Act 1954 applies.

Section4 of the said 1954 Act, specifically states that "Notwithstanding anything to the contrary contained in the provisions of any other law for the time being in force, or in any custom having the force of law, the privosions of this Act shall apply to every Buddhist woman and her non-Buddhist husband".

The Burma Divorce Act: Marriages contemplated by the Burma Divorce Act, having regard to section 7, are those founded on the Christian principle of a union of one man and one woman and consequently the Act does not contemplate relief in cases where the parties have been married under the rites of other laws under which marriages are not monogamous ones (See 8 Bom. L.R. 856). That is, the Act is not intended to apply to, for example, a Hindu marriage or to a Burmese Buddhist marriage (17 M. 235 F.B.) and (Tso Min v. Ma Hta, 19 Cal. 469). The Act will, however, apply to marriages celebrated under the Special Act (vide section 17 of the Act). (Vide section 4 and section 2(1) (a) of the latter two Acts respectively read with section 2 of the Divorce Act).

Jurisdiction under the Burma Divorce Act: The jurisdiction of the Burmese courts for the purposes of any relief to be granted under the Act is determined by the question of whether the petitioner is or is not, resident *(3)* in Burma at the time of presenting the petition (vide para 5 of section 2) and the local jurisdiction of the High Court and a District Court is determined by the place of residence or last residence of the parties (vide last para of section 3). It appears, therefore, that since the Burmese courts claim no jurisdiction to grant any relief to parties not resident in Burma

2 In the case of a Burmese woman, born of parents who profess the Buddhist faith, who has changed her religion to some other faith before the Burmese Buddhist Women Special Marriage and Succession Act, 1954, came into force and continues to profess the new faith she will not be considered as professing the Buddhist faith merely by virtue of the fact of her having been born of Buddhist parents. (Vide proviso to section 2(a) of the said Act).

3 In section 2 of the sentence "or to make decrees of dissolution of marriage except where the parties to the marriage are domiciled in Burma at the time the petition is presented" has been omitted by the Adaptation of Laws Order 1948—Part XXII under the heading 'Personal Laws'.

at the time of presenting the petition, they will refuse to admit that anything short of residence can give the foreign courts to decree a matrimonial relief (divorce or otherwise) which will be valid in Burma, and carry with it the legal consequences in Burma. (Vide section 7 and the principle laid down in Le Mesurier v. Le Mesuriet, 1895 A.C. 517). In all events, the extent to which foreign matrimonial decrees are given faith and credit in Burma is determined by the decision of the Burmese court in accordance with the laws of Burma. *(4)* Whether a Burmese court will recognise a foreign decree depends upon Burmese laws, irrespective of the validity of the divorce under the foreign law.

Where a marriage had taken place in Burma under its prevailing laws, a judgment of a foreign court dissolving such marriage will be governed by section 13 of the Civil Procedure Code. It will be conclusive as between the same parties or between parties claiming through them but such a judgment of a foreign court can be questioned in the circumstances enumerated in the section, one being, where it appears on the face of the proceedings to be found on a refusal to recognise the law of Burma where such law is applicable. [Sub-sec. (c)]. It would appear also that the enforcement of the foreign judgment will have to be by way of a suit.

INDIA

The Maintenance Orders Enforcement Act, 1921 (18 of 1921) facilitates the enforcement in India of maintenance orders made in territories which have been declared to be reciprocating territories under section 3 of the said Act. Under section 3 of the above Act as it existed prior to its substitution by section 4 of the Maintenance Orders Enforcement (Amendment) Act, 1952 (47 of 1952), reciprocal arrangements in respect of execution of maintenance orders had been made with the following countries: —

1. England and Ireland
2. Western Australia
3. Colony of Seychelles
4. New South Wales
5. Straits Settlements
6. Colony of Mauritius
7. Somaliland Protectorate
8. Basutoland, Bechuanaland and Swaziland Protectorates

4 For example, decrees of dissolution of a marriage between Burmese citizens, passed by the court of a foreign State, could not have the effect of dissolving the marriage a vinculo for any grounds on which such a marriage is not liable to be dissolved **a vinculo** in the Burmese courts.

9. Uganda Protectorate
10. Territory of the Seat of the Government of the Commonwealth of Australia
11. Victoria
12. Federation of Malaya
13. British Burma
14. Union of South Africa, Southern Rhodesia and Northern Rhodesia
15. Nyasaland
16. Kenya
17. Zanzibar Protectorate
18. Ceylon
19. Sarawak

When the above arrangements were made, the Act applied only to those territories of India which were then known as "British India". It was subsequently extended to the whole of India excluding Jammu & Kashmir. To enable full reciprocity in the matter of execution of maintenance orders emanating in India and those in the countries mentioned above, it was considered necessary to issue fresh notifications under the amended section 3 of the above Act. Such notifications have been issued in respect of the following 13 countries out of the 19 mentioned above:

1. Colony of Seychelles
2. Colony of Singapore
3. Colony of Mauritius
4. Somaliland Protectorate
5. Uganda Protectorate
6. Basutoland, Bachunaland and Swaziland Protectorates
7. Federation of Malaya
8. Union of Burma
9. Southern Rhodesia and Northern Rhodesia
10. Nyasaland
11. Kenya
12. Zanzibar Protectorate
13. Sarawak

So far as the Government of the United Kingdom and Northern Ireland is concerned, the Order-in-Council is 1922 operated, by virtue of the India (Consequential Provisions) Act 1949, to extend the U.K. Maintenance Orders (Facilities for Enforcement) Act 1920, to the Republic of India in the same manner in which it operated before India became a Republic. Hence it was not necessary to issue any fresh notification as in the case of

other countries. The question of issue of similar notifications in respect of the Capital Territory of the Government of the Commonwealth of Australia and Victoria is under consideration in consultation with the Governments of the respective countries. The reciprocal arrangements with Western Australia, New South Wales and the Union of South Africa have been cancelled.

Law of Ceylon

In Ceylon the decision in Le Mesurier's Case (1895, 1 N.L.R. p. 160) established the principle that only the competent courts of the husband's matrimonial domicile which could grant a divorce in favour of spouses who were resident in Ceylon but who had their matrimonial domicile in England by extending the provisions of the Indian and Colonial (Divorce Jurisdiction) Act of 1926 (16 and 17 George V Chapter 40 to Ceylon S.R. & O. (1935) No. 562). The Chief Justice was empowered to appoint a judge of the Supreme Court of Ceylon to hear such actions. With the granting of dominion status to Ceylon these provisions ceased to have any effect in Ceylon. So that the position today is that persons domiciled in England cannot obtain divorce in Ceylon. In Ceylon the jurisdiction rule in matrimonial actions is based on the ruling in Le Mesurier's case. In view of the binding effect of this decision, it is doubtful whether one court will recognise the principle enumerated in the Armitage case. Ceylon courts have jurisdiction only if the matrimonial domicile of the spouses is in Ceylon and one of the spouses is resident within the jurisdiction of the District Court in which the action is brought.

A summary of the laws of marriage & divorce as pertaining to Ceylon is given below.

Marriage: The validity of marriages contracted in Ceylon (except Kandyan, Muslim and foreign marriages) is now governed by the General Marriage Ordinance No. 19 of 1907, ch. 95. Marriages and divorces among Kandyans are governed by the Kandyan Marriage and Divorce Act No. 44 of 1952, among Muslims by Act No. 13 of 1951 and among foreigners by Ordinance No. 12 of 1903 ch. 100.

It is also open to persons other than Kandyans to contract a marriage according to native rights and customs, for example, among the Hindus and Low Country Sinhalese under Ceylon Law Polygamous and Polyandrous Marriages are illegal except among Muslims who are permitted to marry more than once.

Divorce: Under the Roman Dutch Law which is the general law in the land, adultery subsequent to marriage and malicious

desertion are two grounds for divorce. The General Marriages Ordinance No. 19 of 1907 section 18 supplies of third ground, namely incurable impotency at the time of the marriage.

Every district court in the island is given jurisdiction in matrimonial matters by the Courts Ordinance and an action for divorce may be filed in the district court where spouses reside—section 597 of the C.P.C. In Le Mesurier v. L.M. (1 N.L.R. 160) the Privy Council laid down that a divorce action could be brought only in the country of the domicile of the husband, thus it would seem that this case adds to the requirement of residence under section 597 of the C.P.C. the additional consideration of a Ceylon domicile.

Sections 600 and 601 of the C.P.C. set out the absolute against entering of a decree for divorce. The two sections state that the court should not only satisfy itself upon the facts alleged but also on questions of connivance, condonation and collusion. In any one of these cases the court has no option but to dismiss the action. Even if the court finds that the plaintiff has proved his case and that he has not been guilty of connivance, condonation or collusion yet there is judicial discretion given to the court to decree or not a divorce if it finds that the plaintiff has been guilty of adultery, cruelty, wilful neglect or of misconduct towards the other party, or unreasonably deserted or wilfully separted from the other spouse or has unreasonably delayed in filing action.

Marriage and Divorce according to Kandyan Law

Marriage: Prior to 1859 there was no written law governing marriage. Customary ceremonies gave the necessary recognition to matrimonial alliances.

Ordinance No. 13 of 1859 while validating existing customary marriages provided for the registration of all future marriages. Te law as it stands today is contained in Ordinance No. 3 of 1870 Chapter 96 under which no marriage among the Kandyans is valid unless it is registered. Still more recently the Kandyan Divorce Act No. 44 of 1952 was passed which among other matters provided for solemnisation and registration before the Divisional or District Registrar of Marriages. Of course the Kandyans may lawfully marry under the provisions of the General Marriage Ordinance No. 19 of 1907 chapter 95 in which event the dissolution of such a marriage has to be founded on the grounds set down under the General Marriages Ordinance.

Divorce: The law as it stands now is contained in Ordinance

No. 3 of 1870 as amended by Act 44 of 1952. The grounds for divorce are:

(1) Adultery of wife after marriage
(2) Adultery by the husband coupled with gross cruelty or incest.
(3) Complete and continued desertion for two years.
(4) Inability to live happily together, the test being separation from and board for a year.
(5) Mutual consent.

Divorce is effected by an application made by either spouse to the District Registrar who is empowered to make an order in his discretion either granting or refusing a dissolution and any party aggrieved by such an order may appeal to the district court. The dissolution of the marriage shall be entered in the Divorce Register.

Muslim Law of Marriage and Divorce

Marriage and divorce among Muslims are now governed by Act No. 13 of 1951 which enacts that all marriages and divorces should be registered. Solemnization and registration of Muslims marriages are effected by the Registrar of Muslims Marriages.

Three modes of divorce are recognised in Ceylon. (1) At the instance of the husband called Talaq by which a husband may divorce his wife without assigning any reason either by one or three pronouncements of Talaq. (2) At the instance of the wife called Khul if claimed by her on account of some "fault on his part". The grounds for a Khul divorce are enmity between husband and wife. There is reason to fear that it is not possible for them to live together as husband and wife. A Fasah divorce is based on grounds of illtreatment or on account of an act or ommission on the husband's part amounting to a "fault". (3) At the instance of both by mutual consent called Mubarat.

Under the new Act application for all types of divorce should be to the Quazi who assisted by three assessors has exclusive jurisdiction to entertain such applications and effect all types of divorce knwn to Muslim Law. All divorces must be registered by the Quazi. Any party aggrieved shall have a right of appeal to a board of five Quazis and from the order of the board to the Supreme Court.

Maintenance

All applications against the husband for maintenance of his wife and his children legitimate or illegitimate must be made under

the provisions of the Maintenance Ordinance No. 19 of 1889 Chapter 76. Though the proceedings are civil in nature and determined on a balance of evidence the applications are made to a criminal court before a Magistrate.

Under the Married Women's Property Ordinance Chapter 46. a married woman having separate property can be ordered by the Magistrate to maintain a husband who is unable to maintain himself.

Under the Kandyan Divorce Act 44 of 1952, the District Registrar when making an order dissolving a Kandyan marriage is also given the power to award alimony and maintenance and also to enter any terms of agreement for the payment of compensation.

Likewise among the Muslims the Quazi when entering a divorce has power to make order for maintenance in favour of a wife or a legitimate or illegitimate child.

It would seem therefore that these powers of the District Registrar and the Quazi are concurrent with that of the Magistrate to grant maintenance under the Maintenance Ordinance No. 19 of 1889.

Enforcement of Foreign Maintenance Orders

With regard to enforcement of Foreign Maintenance Order in Ceylon, statutory provisions are to the following effect:

(1) With regard to Great Britain and the British Possessions or Protectorates, there is the British Maintenance Ordinance, Chapter 77 which provides:

(a) for the registering of a Maintenance Order made in England or Northern Ireland in a Magistrate's Court in the Island and on registration it has the same force and effect and become enforceable, as if it were an order made by such registering court under the Maintenance Ordinance.

(b) the magistrate's court in the Island is also given powers under this Ordinance to hear ex parte a maintenance application against any person resident in England or Northern Ireland and make an order for maintenance which becomes effective when confirmed by a competent court in England or Northern Ireland.

(c) In similar manner the Magistrate's court in Ceylon is given the power to confirm a maintenance order made in England or Northern Ireland against any person resident in Ceylon and when

so confirmed shall become enforceable as if it were an order made by such court under the Maintenance Ordinance.

It should be noted that the provisions of this Ordinance becomes applicable to the British Possessions or Protectorates only when the Governor by Proclamation extends the Ordinance to such Possession or territory.

It has been extended to the following countries:

(1) Australia
(2) British India and British Burma
(3) Federated Malaya States
(4) Canada
(5) Hongkong
(6) Mauritius
(7) New South Wales
(8) New Zealand
(9) Straits Settlements
(10) Uganda
(11) Unfederated Malaya States of Johore, Kedah, Perlis, Kelantan, Trengganu and Brunei
(12) Victoria
(13) State of Western Australia
(14) Federation of Malaya
(15) Bailiwick of Guernsey

(2) With regard to foreign countries outside the British Commonwealth we have the Enforcement of Foreign Judgments Ordinance Chapter 78 which provides for the enforcement in Ceylon of judgments given in other countries which are willing to concede to Ceylon the same reciprocal treatment with regard to judgments given in Ceylon as it has not been so proclaimed by the Governor in terms of section 2 of that Ordinance. It provides for registration in the district court of Colombo of a judgment given by a superior court of a foreign country within six years of its delivery and on registration it would acquire for the purposes of execution the same force and effect as if it were a judgment of that court.

APPENDIX II

THE ENGLISH LAW

...**The English Common Law:** The courts in England refused to entertain a suit for dissolution of marriage unless the parties were domiciled in England. In dealing with foreign decrees for divorce, the English courts insist that the foreign court in which the decree was obtained is the court of the husband's domicile (See Harvey v Farnie (1880) 5 P.D. p. 153). The English courts applied this rule where the marriage was contracted in England between parties who are British subjects. The decree dissolving such a marriage is exclusively governed by the law of the domicile (See Harvey v. Farnie (1882) 8 App. Case 43).

However, the courts relaxed the rigidity of this rule by accepting the principle that a decree obtained in a country foreign to the country of domicile upon a ground which would be sufficient by the internal law of the country of domicile would be recognised in England. (Armitage v. A.G. (1906) p. 135) The English Law also insists that a divorce required a judicial process. This was established in the Hammersmith Marriage Case (1917) 1 K.B. 634, where divorce among Muslims valid according to the Koranic Law was held to be ineffectual in England, because firstly, there was no judicial decree and secondly the **lex domicili** could not be resorted to, as the marriage in question was not a marriage in the Mohammedan sense at all and therefore could not be dissolved in a Mohammedan manner. The view was taken that in such matters the court must look at the **lex loci celebrationis** and not the lex **domicili.** In Sasson v. Sasson (1924) 1 A.C p. 1007, the Judicial Committee of the Privy Council took a different view and recognised a divorce between the Jews, effected by the delivery of what is known as gett, a form of divorce which the **lex domicili** of the husband, namely the Jewish Law, recognised.

The right rule of common law that nothing short of domicile entitles a foreign court to pronounce a decree for divorce has been altered in certain respects by statutory law in England. The Indian and Colonial (Divorce Jurisdiction) Act of 1926, (16 and 17 George V. Chapter 40) which was passed in consequence of the decision in Keyes v. Keyes (1921) p. 204, and a later statute, the Indian and Colonial (Divorce Jurisdiction) Act of 1940 (3 and 4 Geo. VI. Chapter 35), partially solved this problem by conferring upon the Indian High Courts divorce jurisdiction over

those who are domiciled in England or in Scotland, but resident in India. The exercise of this jurisdiction, however, is subject to various restrictions. This Act was extended to various countries such as Ceylon (S.R. & O. 1936 No. 562); Jamacia (S.R. & O. 1931 Nos. 851, 1103, S.R. & O. 1932, Nos. 475, 646); and Hong Kong (S.R. & O. 1935, No. 836).

By Section 13 of the Matrimonial Causes Act of 1937, jurisdiction in divorce was conferred on the English court in regard to the petition of a wife who was deserted by her husband when he was domiciled in England and before he later acquired a domicile elsewhere or was deported. By the Matrimonial Causes (War Marriages) Act, 1944, one could sue for a divorce in the English courts notwithstanding the spouse was not domiciled in England, if the marriage took place since the 3rd September, 1939, and subject to certain other conditions. The Law Reform (Miscellaneous Provisions) Act of 1949 gave some relief. Most of these are now consolidated in the Matrimonial Causes Act, 1950.

The main effect of this legislation is to give the English court jurisdiction in divorce in favour of a wife whose husband is domiciled outside the United Kingdom, provided the wife has resided in England for three years immediately before the commencement of proceedings. (See R. H. Graveson: Recognition of Foreign Divorce Decrees—The Grotius Society Transactions, Vol. 37, p. 150 at 152).

2. LAW OF CANADA

In Attorney General v. Cook (1926 A.C. 444 P.C.) the Judicial Committee of the Privy Council adopted the principle that the wife's domicile is the same as that of the husband. In this case parties were married in 1913 in Ontario. They went to the United States in 1917 and in 1910 the wife went to Calgary, Alberta, where she resided continuously thereafter. In November, 1921, she obtained a decree for judicial separation in the Supreme Court of Alberta and later in 1922 brought a suit for divorce as to courts of Alberta. The trial court found that the husbnad was never domiciled in Alberta. The Privy Council held that since her domicile was same as her husband's, the divorce was bad.

An Act was passed in 1930 known as the Divorce Jurisdiction Act 1930 (20-21 Geo. 5 c. 15). It enabled a deserted wife who has been living separately from her husband for two years or more to bring an action for divorce in the competent court in the province in which her husband was domiciled prior to the desertion. This

statute obviously has its limitations. It is not applicable unless the husband was domiciled in the province of Canada and did not apply to wives who all separated as a result of mutual agreement or to a Canadian wife who married a person not domiciled in Canada.

LAW OF AUSTRALIA

An Australian statute was enacted in Victoria in 1889 (The Divorce Act 1889, No. 1056 of 13) under this statute a deserted wife did not lose her domicile merely because the husband acquired a foreign domicile. The Marriage Act 1928 (19 Geo. 5 No. 3726 of 73). Except for a recent change in Western Australia all these statutes proceed in terms of continuing the wife's domicile. Professor Grieveson contends that none of these statutes confer on the wife a capacity to acquire a separate domicile. In all of them the issue of principles evaded by resort to a legal fiction [Grievson —Jurisdiction, Unity of Domicil and Choice of Law under the Law Reform (Miscellaneous Provisions) Act 1940, 3 International Law Quarterly, 371, 373 (1950)]. None of these apply unless a wife is deserted or lives in voluntary separation.

The Matrimonial Causes and Personal Status Code of Western Australia enacted in 1948 confers jurisdiction to the court in the following cases:

(a) If the husband, wherever resident is domiciled in the State and at the commencement of the action.

(b) if both parties are resident in the State but the husband is domiciled out of the State and by Law of the domicil her husband the plaintiff will be able to obtain relief on the same grounds on which the relief is obtained.

(c) to a wife who appears in the role of a plaintiff who is deserted by her husband and the husband's domicile immediately prior to the desertion was in that State.

(d) to a wife who brings an action at the time she is separated by an order of a court or by mutual agreement if the husband at the date of the order or agreement was domiciled in that State.

(e) to a plaintiff (wife) who has lived in that State apart from her husband for a period not less than three years prior to the commencement of the action if in the circumstances that had she been unmarried her domicile would have been in that State.

In addition to these statutes, a Commonwealth statute, the Matrimonial Causes Act, 1945 (No. 22 of 1945) has made provision. Apart of this statute is similar to the War Marriage Act of Great Britain.

3. LAW OF NEW ZEALAND

The Divorce Act, 1898, 62 Vict. No. 42 (Section 3) provided as follows:

A deserted wife who was domiciled in New Zealand at the time of desertion is presumed for purpose of the Act, to have retained her New Zealand domicile notwithstanding that her husband may have since the desertion acquired any foreign domicil. This provision was carried forward in subsequent New Zealand Statutes (Divorce and Matrimonial Causes Act 1908—8 Edw. 7, No. 50 of 21 (3). Divorce and Matrimonial Causes Act 1928 (19 Geo. 5 No. 16 of 12(1).

Following the decision of the Privy Council in Attorney General v. Cook, two amendments were made to the New Zealand Act. The 1928 Act. Section 12 (2) extended the remedy to wives who were separated from their husbands as a result of mutual agreement or by an order of court. The earlier restriction that the wife should have been deserted was removed. In 1930 (Divorce and Matrimonial Causes Amendment Act, 1930, 21 Geo. 5 No. 43 of 3) a new para was added to Section 12 to enable a wife who had been residing for three years immediately previous to the date of the action with the intention of permanently residing there to bring a matrimonial action for in 1947 New Zealand enacted the Matrimonial Causes (War Marriages) Act (11 Geo. to No. 8), on lines similar to the English counterpart.

LAW OF THE UNITED STATES OF AMERICA

From the earliest times, the United States court accepted the position that a wife can have a separate domicil (See Tolen v. Tolen—2 Black 407 (Ind. 1831) and Harding v. Alden (9 Gre. 140 Me. 1852). Some courts felt that the recognition of the separate domicile of the wife was only for the purposes for divorce, but some courts have recognised such a separate domicil for all purposes. The latter view has been finally recognised in the restatement of the conflict of laws. Section 28 of the 1948 Supplement reads: "If a wife lives apart from her husband she can have a separate domicil."

APPENDIX III

I. DRAFT CONVENTION ON THE RECOVERY ABROAD OF CLAIMS FOR MAINTENANCE

Preamble

Considering that the situation of dependents left without means of support by persons in another country constitutes a pressing humanitarian problem; and

Considering that the prosecution or enforcement abroad of claims for maintenance gives rise to serious legal and practical difficulties; and

Considering that it is therefore necessary to facilitate the prosecution of claims and the enforcement of judgments for maintenance, in cases where the claimant resides or is present within the territory of one Contracting Party and the respondent is present within the jurisdiction of another Contracting Party,

Wherefore the Contracting Parties have agreed as follows:

Article 1

Definition

In this Convention:

(a) "Claimant" means the person who claims to be entitled to maintenance by an ascendant, descendant, or spouse. The terms "ascendant" and "descendant" mean all persons related in direct line either by blood or by operation of law;

(b) "Respondent" means the person from whom maintenance is claimed;

(c) "Transmitting agency" means the agency appointed to assist claimants within its territory and to expedite the transmission abroad of papers in order to facilitate the prosecution of maintenance claims;

(d) "Receiving agency" means the agency designated by each Contracting Party to receive from transmitting agencies papers relating to claims for maintenance and to assist claimants in the territories of other Contracting Parties in the prosecution of such claims.

Article 2

Designation of Agencies

1. Each of the Contracting Parties may designate one or more agencies which shall act in its territory as the transmitting

agency. Such transmitting agency may be a judicial or administrative agency in accordance with the law of each Contracting Party.

2. The different functions of the transmitting agency in the preparation of the papers in the case and their transmission to the receiving agency may be entrusted to separate authorities.

3. In the event that one of the Contracting Parties has not designated a transmitting agency, any authority having the power to render maintenance orders may act as a transmitting agency.

4. Each of the Contracting Parties shall, at the time when the instrument of ratification or accession is deposited, designate a receiving agency, public or private; such receiving agency may be designated a transmitting agency within the meaning of paragraph 1.

5. Each Contracting Party undertakes to communicate without delay to the other Contracting Parties any designation of the transmitting agency and any change which may occur in the designation of the receiving or transmitting agency.

6. The agencies contemplated in the preceding paragraphs are authorized to communicate directly with corresponding agencies in the territories of the other Contracting Parties.

Article 3

Presentation of Claims

1. If a claimant resides or is present within the territory of one Contracting Party and the respondent is present within the jurisdiction of another Contracting Party, the claimant may make application to the transmitting agency of the State in which such claimant resides or is present, requesting such agency to transmit the necessary papers relating to his claim to the receiving agency of the State where such respondent is present.

2. A hearing may be held, on the motion of the transmitting agency or at the request of the claimant, providing the law of the State of such agency so allows.

Article 4

Application

1. The application shall state:

(a) The name, nationality, profession, age and address of the claimant;

(b) the name, nationality, profession, age and address of the respondent, in so far as known to the claimant;

(c) the relief sought, indicating the amount and the manner of the payment;

(d) the grounds upon which the claim is based and any other pertinent information, in particular as regards the financial and the family circumstances of the claimant and of the respondent;

(e) the names and addresses of witnesses, if a hearing is requested by the claimant.

2. The application shall be accompanied by all pertinent documents, and by a statement of the places where supplementary documents may be found.

Article 5

Transmission of Claims for Maintenance

1. The transmitting agency shall summarily determine whether the application, the accompanying documents and the evidence presented at any hearing which may have been held, make out a case for transmission to the receiving agency. If the agency so determines, the reasons for such determination and, where appropriate, evidence of the claimant's need of free legal aid and exemption from costs shall be added to the papers in the case.

2. Such papers, duly certified and listed in an inventory, together with the transcript of any hearing which may have been held, shall be transmitted directly and without delay by the transmitting agency to the receiving agency designated by the State in which the respondent is present, unless such papers are withdrawn by the claimant for direct transmission to a counsel chosen by him.

Article 6

Transmission of Claims Reduced to Judgment

A claimant who has recovered a judgment for maintenance may make application to have the record of the judgment transmitted under the provisions of Articles 3 and 5 as evidence of the claim. In such case, the record may substitute for the documents prescribed in Article 4, and the proceedings contemplated in Article 7 may include, in accordance with the law of the tribunal in which such proceedings are instituted, proceedings by exequatur or by a new action based upon the initial judgment.

Article 7

Proceedings in the Competent Tribunal

1. In the absence of a duly legalised declaration to the contrary by the claimant, the receiving agency, upon receipt of the papers in the case, shall be authorised to cause proceedings to be instituted and prosecuted in a competent tribunal, as well as to procure the execution of such judgment as may be rendered, and shall do so without delay.

2. The law of the tribunal shall govern such proceedings.

3. If, under the law of the tribunal, the papers submitted do not constitute evidence, the tribunal may, nevertheless, after examining the papers, make an interim order for the payment of maintenance while the proceedings are pending.

Article 8

Letters of Request

If provision is made for letters of request in the laws of the two Contracting Parties concerned, the following rules shall apply in the proceedings contemplated in Article 7:

(a) If the tribunal deems it necessary to obtain further evidence, and, in particular, to have the facts ascertained by a hearing in another country, it may address letters of request either to the competent tribunal of the State where the evidence is to be taken or to any other authority or institution designated by the State where the request is to be executed.

(b) In order that the parties may attend or be represented, the requested authority shall give notice of the date on which and the place at which the proceedings requested are to take place, to the receiving agency of the State wherein the respondent is present and to the transmitting agency of the State wherein the claimant resides or is present, or, in case a transmitting agency has not been designated, directly to the claimant.

(c) Letters of request shall be drawn up either in the language of the requested authority or in a language agreed upon between the two interested States, or it shall be accompanied by a translation into one of such languages, certified by a sworn translator of the requesting or of the requested State.

(d) Letters of request must be executed within a period of four months, dating from the receipt of the letters by the requested authority.

(e) The execution of letters of request shall not give rise to reimbursement of fees or costs of any kind whatsoever. Nevertheless, in the absence of agreement to the contrary, the requested State shall be entitled to demand of the requesting State reimburse-

ment of payments made to witnesses or to experts, and of costs which may have been incurred by the failure of one or more witnesses to appear voluntarily.

(f) Execution of letters of request may only be refused;

(1) If the authenticity of the letters is not established;

(2) If the State in the territory of which the letters are to be executed deems that its sovereignty or safety would be compromised thereby.

Article 9

Variations of Maintenance Orders

The provisions of this Convention apply also to applications for variation of maintenance orders.

Article 10

Exemptions and Facilities

1. Claimants residing or present in the territory of another Contracting Party shall be given equal treatment, and shall be granted the same exemptions in the payment of the costs and charges incurred in any proceedings under this Convention, as residents of the State where such proceedings occur.

2. If the law of the tribunal requires any bond or other security of persons residing or present abroad, claimants residing or present in the territory of another Contracting Party shall be exempt therefrom in all proceedings under this Convention unless, in the case of a Federal State, such exemption would discriminate as against claimants residing or present in other member States or sub-divisions of such federal State.

3. No fees shall be chargeable for certification and legalization of documents in any proceeding under this Convention.

Article 11

Transfer of Funds

1. In order to ensure and expedite the free transfer to the territories of other Contracting Parties of funds payable on account of maintenance obligations judicially established in the courts of a Contracting Party in the cases contemplated in this Convention, each such Party undertakes, in case of exchange restrictions, to accord to such transfers the highest priority provided for capital services.

2. Each Contracting Party reserves the right:

(a) To take the necessary measures to prevent transfers of funds pursuant to paragraph 1 for purposes other than the bona fide payment of existing maintenance obligations;

(b) To limit the amounts transferable pursuant to paragraph 1, to amounts necessary for subsistence.

Article 12

Supplementary Arrangements

In order to facilitate compliance with the provisions of the present Convention, the Contracting Parties may, by domestic legislation, or by bilateral or multilateral conventions, provide for any matters not regulated, or insufficiently regulated, in the present Convention.

Article 13

Remedies outside the Convention

The remedies provided in this Convention are in addition to, and not in substitution for, any other remedies.

Article 14

Federal State Clause

No provision of this Convention shall be deemed to affect, or to impose any obligation in respect of, any matter not within the constitutional competence of a federal State, a Party to this Convention.

Article 15

Ratification and Accession

1. This Convention shall be open for ratification or accession on behalf of any Member of the United Nations, any non-Member State which is Party to the Statute of the International Court of Justice, or member of a specialized agency, and also any other non-Member State to which an invitation has been addressed by the Economic and Social Council. Ratification or accession shall be effected by the deposit of a formal instrument with the Secretary-General of the United Nations.

2. The word "State" as used in the preceding paragraph shall be understood to include the territories for which each Contracting