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CITATION

These reports are cited thus:

[1978] 1 All ER

REFERENCES

These reports contain references, which follow after the headnotes, to the following major works of legal reference described in the manner indicated below.

Halsbury's Laws of England

The reference 35 Halsbury's Laws (3rd Edn) 366, para 524, refers to paragraph 524 on page 366 of volume 35 of the third edition, and the reference 2 Halsbury's Laws (4th Edn) para 1535, refers to paragraph 1535 on page 708 of volume 2 of the fourth edition of Halsbury's Laws of England.

Halsbury's Statutes of England

The reference 5 Halsbury's Statutes (3rd Edn) 302 refers to page 302 of volume 5 of the third edition of Halsbury's Statutes of England.

English and Empire Digest

References are to the replacement volumes (including reissue volumes) of the Digest, and to the continuation volumes of the replacement volumes.

The reference 44 Digest (Repl) 144, *1240*, refers to case number 1240 on page 144 of Digest Replacement Volume 44.

The reference Digest (Cont Vol B) 287, *7540b*, refers to case number 7540b on page 287 of Digest Continuation Volume B.

The reference 28(1) Digest (Reissue) 167, *507*, refers to case number 507 on page 167 of Digest Replacement Volume 28(1) Reissue.

Halsbury's Statutory Instruments

The reference 12 Halsbury's Statutory Instruments (Third Reissue) 125, refers to page 125 of the third reissue of volume 12 of Halsbury's Statutory Instruments; references to subsequent reissues are similar.

CORRIGENDA

[1977] 3 All ER

p 1057. **James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd.** Line *g* 6: for 'priority' read 'propriety'.

[1978] 1 All ER

p 554. **Jelson Ltd v Blaby District Council.** Line *g* 3: for 'casual' read 'causal'.

p 610. **Harrison (Inspector of Taxes) v Nairn Williamson Ltd.** Counsel for the taxpayer company: for 'Peter Whiteman' read 'Peter Whiteman QC'.

Cases reported in volume 1

Newmarch v Newmarch

FAMILY DIVISION
REES J
25th, 26th OCTOBER 1976, 25th, 26th, 27th JANUARY, 21st FEBRUARY 1977

Divorce – Foreign decree – Recognition by English court – No opportunity for spouse to take part in foreign proceedings such as should reasonably have been given – Notice given to spouse of foreign proceedings and of procedural steps necessary to defend them – Foreign lawyers instructed by spouse to take necessary steps to defend suit – Lawyers failing to take necessary steps – Court not informed of spouse's desire to defend suit – Decree made in default of defence – Whether spouse had not 'been given . . . such opportunity to take part in the proceedings as . . . he should reasonably have been given' – Whether court having jurisdiction to refuse recognition – Recognition of Divorces and Legal Separations Act 1971, s 8(2)(a)(ii).

Divorce – Foreign decree – Recognition by English court – Discretion to refuse to recognise divorce – Factors governing exercise of discretion – Right to obtain enforceable maintenance orders in England despite foreign decree – Wife having been given no opportunity to take part in foreign divorce proceedings – Wife unlikely to have been able to defend suit effectively if given opportunity – Wife's purpose in wishing to defend to obtain maintenance order – Wife having obtained interim maintenance order against husband on ground of wilful neglect to maintain – Foreign decree not precluding wife from obtaining substantive maintenance order – Whether court justified in rejecting application to refuse recognition of foreign decree – Recognition of Divorces and Legal Separations Act 1971, s 8(2).

Husband and wife – Wilful neglect to maintain – Divorce – Discretion to make maintenance order after parties divorced – Proceedings for maintenance started before divorce – Divorce by foreign decree – Prior to divorce wife obtaining interim maintenance order – Competent foreign court discharging interim order on ground that husband unable to pay amount of order – Discharge of order subject to confirmation by English court – Finding in foreign divorce proceedings that wife deserted husband – Whether discretion remaining to confirm interim order and make substantive order for maintenance – Whether finding of fault against wife in foreign divorce proceedings factor to be considered – Recognition of Divorces and Legal Separations Act 1971, s 8(3) – Matrimonial Causes Act 1973, s 27(1)(a)(i).

The husband and wife were married in 1947 and had one child. The husband was living in Australia. Since December 1971 he had been in desertion of the wife. By November 1972 the marriage had irretrievably broken down. In July 1974 the wife applied to a county court for reasonable maintenance under s 27(1)(*a*)(*i*)[a] of the Matrimonial Causes Act 1973. The county court directed that the application should be transferred to the High Court but made a provisional interim maintenance order

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a Section 27(1), so far as material, provides: 'Either party to a marriage may apply to the Court for an order under this section on the ground that the other party to the marriage—(*a*) being the husband, has wilfully neglected—(i) to provide reasonable maintenance for the applicant. . .'

against the husband for payment of £125 a month. On 30th July 1974 the husband petitioned for divorce in Australia on the ground of desertion by the wife. On 14th October the wife was served with the husband's petition and a form of notice warning her of the necessity to file an answer to the petition within the prescribed time. By letter dated 24th October the wife's English solicitors instructed Australian solicitors to act on her behalf in the husband's suit and advised them that the wife denied the husband's allegation of desertion and wished strenuously to defend the suit. The letter made it plain that the wife was without means and was in receipt of social security benefit and that she wished to obtain legal aid in Australia to contest the suit. By letter dated 25th November the wife's Australian solicitors informed the husband's solicitors of the wife's intention to file an answer to the petition denying desertion and alleging desertion against him. On 9th December the wife's English solicitors confirmed to her Australian solicitors that it was the wife's settled intention to defend the suit and cross-petition on grounds of desertion and adultery. On 21st January 1975 the interim maintenance order made in July 1974 was registered in the Sydney Children's Court for enforcement against the husband. On 27th June that court, on the husband's application, provisionally discharged the interim maintenance order on the grounds that the wife was able to support herself, that she had deserted the husband, that the husband had already made financial provision for her and that he did not have sufficient resources to meet the interim order. Discharge of the interim order was, however, made subject to confirmation by a competent United Kingdom court. On 17th September the wife took out a summons in the High Court in England asking for directions to be given in her application under s 27 of the 1973 Act as to confirmation or refusal of confirmation of the discharging order dated 27th June. Despite the clear and repeated instructions given by the wife and her English solicitors to the Australian solicitors to file an answer to the husband's suit, the instructions were not complied with and an answer was not filed. On 1st October the wife's English solicitors wrote to the registrar of the Family Division of the Supreme Court of New South Wales summarising the instructions which had been given to the wife's Australian solicitors and enquiring what steps could be taken to avoid the suit going against the wife by default. On 15th October the suit came on for hearing, undefended, in the New South Wales Supreme Court. The judge was not told of the instructions which had been given to the wife's Australian solicitors or of the letter of 1st October to the court registrar. On formal proof of the husband's allegation of desertion the judge granted the husband a decree nisi and the decree was made absolute on 30th October. The wife had wished to defend the suit mainly to obtain a maintenance order for herself. On 5th December the wife's summons for directions came on for hearing in the High Court and was adjourned generally. On 2nd November 1976 the wife filed a petition praying for a declaration that the court should refuse recognition of the decree absolute granted on 30th October 1975 under s 8(2)[b] of the Recognition of Divorces and Legal Separations Act 1971, on the ground, inter alia, that the decree had been obtained without the wife 'having been given . . . such opportunity to take part in the proceedings as [she] should reasonably have been given', within s 8(2)(*a*)(ii). The petition also prayed for dissolution of the marriage and for reasonable financial provision.

Held – (i) It was open to the court to hold that a spouse who had had ample notice of foreign divorce proceedings and the procedural steps to be taken to defend them but whose explicit instructions to solicitors to take those procedural steps had not been complied with was a person who had not 'been given . . . such opportunity to take part in the proceedings as [she] should reasonably have been given', within s 8(2)(*a*)(ii). However, the court had a discretion under s 8(2) whether or not to refuse recognition

b Section 8(2), so far as material, is set out at p 6 *j*, post

of the foreign decree even where a spouse had not been given a reasonable opportunity to take part in the proceedings. In exercising the discretion the court should have regard to all the surrounding circumstances including the facts relied on to support refusal of recognition, the likely consequence if the spouse had been given the opportunity to take part in the proceedings, an assessment of the spouse's legitimate objectives in wishing to take part in the proceedings, to what extent those objectives could be achieved if the foreign decree remained valid and the consequences to the spouses if recognition of the divorce were refused (see p 9 *j* to p 10 *a* and p 11 *a* to *d*, post); *Jakeman v Jakeman and Turner* [1963] 3 All ER 889 applied.

(ii) Notwithstanding that the wife had established that, despite clear and repeated instructions to her solicitors to defend the suit, she had not been given such an opportunity to take part in the Australian proceedings as she should reasonably have been given, the validity of the Australian decree should be upheld for the following reasons—

(a) It was improbable that the Australian court would have compelled the husband to provide the considerable sums required for the wife's return fare from England to Australia, her keep in Australia and her legal costs of defending the suit; accordingly even if an answer had been filed she would not have been able to defend the suit effectively (see p 11 *h* to p 12 *a*, post).

(b) It was open to the wife, despite the validity of the Australian divorce decree, to seek confirmation of the interim maintenance order made in July 1974 and to obtain a substantive maintenance order for under s 27 of the 1973 Act a discretion remained in the court to make an order in proceedings for maintenance which had been commenced before the parties were divorced even though at the date when the order was made the parties had been divorced by a foreign decree. Accordingly, even if the validity of the Australian decree were upheld, and notwithstanding discharge of the interim maintenance order by the court in Sydney, the court had a discretion to confirm or vary the interim maintenance order and to make a substantive order on the ground of wilful neglect to maintain the wife. The fact that there had been a finding in the Australian proceedings of desertion against the wife was not binding on the court, by virtue of s 8(3) of the 1971 Act, and the court was entitled to consider the application for maintenance on the basis of its own findings that the wife had not deserted the husband and that he had condoned her adultery. It followed that refusal to recognise the Australian decree would not assist the wife to obtain maintenance orders, which had been the main purpose of her wish to take part in the Australian proceedings (see p 12 *a* to *c*, p 13 *a* *d* *e*, p 15 *e* *f* and p 16 *g* to p 17 *a*, post); *Wood v Wood* [1957] 2 All ER 14 applied; *Gray v Gray* [1976] 3 All ER 225 considered.

Notes

For grounds for refusing recognition of foreign divorces, see 8 Halsbury's Laws (4th Edn) para 487, and for cases on the subject, see 11 Digest (Reissue) 545-554, *1188-1231*.

For financial provision in case of wilful neglect to maintain, see 13 Halsbury's Laws (4th Edn) paras 656, 657, and for cases on the subject, see 27(1) Digest (Reissue) 105-112, *716-752*.

For the Recognition of Divorces and Legal Separations Act 1971, s 8, see 41 Halsbury's Statutes (3rd Edn) 222.

For the Matrimonial Causes Act 1973, s 27, see 43 Halsbury's Statutes (3rd Edn) 570.

Cases referred to in judgment

Bragg v Bragg [1925] P 20, [1924] All ER Rep 45, 94 LJP 11, 132 LT 346, 27 Cox CC 729, DC, 27(2) Digest (Reissue) 1008, *8086*.

Gray v Gray [1976] 3 All ER 225, [1976] Fam 324, [1976] 3 WLR 181.

Hack v Hack (1976) 6 Fam Law 177.
Igra v Igra [1951] P 404, 11 Digest (Reissue) 604, *1499*.
Jakeman v Jakeman and Turner [1963] 3 All ER 889, [1964] P 420, [1964] 2 WLR 90, DC, 27(2) Digest (Reissue) 800, *6416*.
McK, Re [1976] The Times, 14th July.
Newton v Newton (1966) 110 Sol Jo 72, CA.
Wood v Wood [1957] 2 All ER 14, [1957] P 254, [1957] 2 WLR 826, 121 JP 302, CA, 27(2) Digest (Reissue) 1009, *8089*.

Cases also cited
Bates v Bates [1964] The Times, 8th December, CA.
D v D [1963] 1 All ER 602, [1963] 1 WLR 194, DC.
Leon v Leon [1966] 3 All ER 820, [1967] P 275.
Mansell v Mansell [1966] 2 All ER 391, [1967] P 306.
Pilcher v Pilcher [1955] 2 All ER 644, [1955] P 318, DC.
Torok v Torok [1973] 3 All ER 101, [1973] 1 WLR 1066.

Petition
This was a petition by the wife, Dorothy Newmarch, praying for (i) a declaration that a decree absolute granted to the husband, Dennis Arthur Newmarch, on 30th October 1975 by the Family Division of the Supreme Court of New South Wales should be refused recognition as a valid decree, under s 8(2) of the Recognition of Divorces and Legal Separations Act 1971, (ii) a decree of dissolution of the marriage and (iii) maintenance pending suit and thereafter for such maintenance and secured and lump sum provision as might be just. The facts are set out in the judgment.

Joseph Jackson QC and *John Beashel* for the wife.
David Prebble for the Queen's Proctor.

Cur adv vult

21st February. **REES J** read the following judgment: I have to consider two sets of proceedings. The first is an amended petition by the wife in which she seeks the following relief: (1) a declaration that a decree of divorce on the ground of desertion, granted on 15th October 1975 and made absolute on 30th October 1975 by the Family Law Division of the Supreme Court of New South Wales in Australia in an undefended suit instituted by her husband, should not be recognised as valid in any part of the United Kingdom; (2) a decree of dissolution of her marriage on the ground of irretrievable breakdown, the facts relied on being adultery, behaviour, desertion and five years' living apart; (3) financial relief and costs.

The second set of proceedings relates to a provisional interim order for maintenance, made by a judge on 16th July 1974 in the Bournemouth County Court on the wife's application under s 27 of the Matrimonial Causes Act 1973, on the ground of wilful neglect to maintain. That maintenance order was transmitted for enforcement against the husband to a reciprocating country, namely Australia, pursuant to the Maintenance Orders (Reciprocal Enforcement) Act 1972, and was duly registered on 21st January 1975 in the Metropolitan Children's Court of Sydney, New South Wales. On 27th June 1975 the presiding magistrate provisionally discharged that order. The wife now invites this court, to which the application under s 27 has been transferred by order of the county court judge, to refuse to confirm the provisional order and to vary it by increasing it.

The case occupied 2½ days. The wife, who was represented by leading counsel, gave evidence at considerable length. The husband, who resides in Australia, was not

represented and did not appear. He was served with notice of the proceedings, but informed his English solicitors that he did not wish to take any part in them. At the invitation of the court, the Queen's Proctor appeared as amicus curiae and was represented by counsel. At the outset I would like to express my thanks to counsel for the assistance they have given me in this complex, anxious and, in some of its aspects, disastrous case.

The present situation of the parties is this. After more than 25 years of a marriage which took place in England, the wife, aged 52 years, is living on social security benefit and is unable to work owing to ill-health. She has received no periodical payments from her husband since November 1973. She owns a long lease of a flat in Poole subject to a substantial mortgage. The husband was a scientist employed at an academic institution in New South Wales at a salary, in June 1975, of the equivalent of not less than £11,750 gross per annum. He was then living with another lady who is said also to be in employment.

The provisional interim order made by the judge in the Bournemouth County Court was £125 per month, but that was discharged by the magistrate in Sydney, on the ground that it was clear on the evidence before him that the husband was not in a position to pay that amount, or apparently any amount. The wife has received no maintenance from her husband since he stopped making the voluntary payments in November 1973, despite the interim order. In the meantime the husband obtained a decree of divorce on the ground of the wife's desertion in the Supreme Court of New South Wales on 15th October 1975 in an undefended suit. It is submitted that that decree should be refused recognition by this court, under s 8(2) of the Recognition of Divorces and Legal Separations Act 1971, on the ground that the wife was not given a reasonable opportunity to take part by defending the suit and cross-praying, or alternatively that to recognise it would be contrary to public policy. If recognition of that decree were refused, and a decree of divorce were granted by this court, it is possible that the Australian courts in their turn might not recognise this court's decree, and the usual unhappy consequences might affect the parties. The case accordingly involves sensitive issues of comity between the courts of this country and those of Australia. It also involves the usual evidential difficulties in reciprocal enforcement proceedings referred to by Latey J in a case called *Re McK*[1]. Neither this court nor the Australian courts have had the benefit of hearing the oral evidence of both parties and their respective witnesses, nor to hear it tested by cross-examination. In addition, there may well be a significant difference of approach between the English courts and the Australian courts in regard to the amount of maintenance to be paid to a separated wife by the husband, and also as to the permissible deductions from the husband's income before the proportion payable to the wife is ascertained. This possible difference of approach is illustrated by *Re McK*[1]. In that case the Sydney court reduced the English court's original provisional order for maintenance of the wife from £3,000 per annum to £275 per annum. On confirmation proceedings, the English court varied the order to a sum of about £2,000 per annum.

I should like to acknowledge my indebtedness to the Metropolitan Children's Court in Sydney for providing the relevant documents and the transcript of the proceedings on 27th June 1975, which includes the evidence of the husband as well as the judgment of the learned magistrate. I am equally indebted to the Supreme Court of New South Wales, Family Division for a transcript of the hearing, which took place on 15th October 1975, and for copies of the documents in the court file relating to the case. Accordingly I have had the advantage of being able to study the record of the husband's evidence, including his cross-examination by counsel instructed on behalf of the wife. In addition, the Australian legal aid office in Sydney and the deputy registrar of the Supreme Court of New South Wales have been good

1 [1976] The Times, 14th July

enough to supply to the Queen's Proctor the answers to a number of questions relative to legal aid matters and to the course which the divorce suit took. a

In order to decide the issues before me, it will be necessary for me to consider the matrimonial history at an appropriate length. The parties were married in the register office at Folkestone in Kent on 21st June 1947, when the husband was 26 and the wife 23. They are now respectively 55 and 52 years of age. [His Lordship considered the rest of the matrimonial history and continued:] Now, what are the grounds on which the husband seeks to justify his rejection of his wife? He asserts that she deserted him b twice. The first alleged desertion is the wife's return to England from Malaya for one month in May and June 1969. I have already indicated that on the evidence that was an agreed holiday trip to England by the wife and could not, and did not, constitute desertion on her part. The second alleged desertion is her departure to England from Australia in June 1970. Similarly, I am satisfied that this departure was by mutual c agreement (albeit reluctantly given on the part of the husband) and, for the reasons I have stated, did not constitute desertion on her part. Further, even if, contrary to my finding, the separation caused by the wife's departure could be deemed to constitute desertion, I should hold that her genuine offers to return to her husband in November and December 1971 would have terminated her desertion. The husband also complains that by her departure from Malaya in June 1969 and from Australia in June 1970 d she damaged his career. I have not found any acceptable evidence that the husband's career was damaged by either event, whether in respect of status or financially. Indeed, the contrary appears to have been the case. That the husband sacrificed his own cherished wishes at the behest of his wife by leaving Malaya to move to Australia there can be no doubt. But he gained thereby in status and increase in salary. It does not appear that the husband seeks to rely as justification for refusing his wife's offer to e return in 1971 on the wife's admitted adultery in England between 1954 and 1959 with B, or in 1969 two or three times with R. If he did so, I should have found that adultery had long since been made known to the husband and that he had condoned it.

In these circumstances, I am satisfied that the husband has been in desertion of his wife since at least December 1971 by refusing to allow her to return to cohabitation f with him. The terms of his letter of 15th November 1971, and his conduct since, establish a settled and firm decision to reject his wife in favour of A C and to put an end to the marriage. It is plain also from that letter, and from the husband's frank confession in the course of his evidence on 25th June 1975 that he had committed adultery with A C frequently since October 1971. That adultery has never been condoned by the wife.

I now turn to consider the submission on behalf of the wife that this court should g refuse recognition of the validity of the decree nisi of divorce, granted by a judge of the Supreme Court of New South Wales, Family Division, on 15th October 1975, and made absolute on 30th October 1975. This submission is made on the basis of the provisions of s 8 of the Recognition of Divorces and Legal Separations Act 1971. This section provides exclusively for the circumstances in which recognition of the validity h of a divorce obtained outside the British Isles may be refused by a court in the United Kingdom. For the present purposes, the relevant provision is s 8(2):

> '. . . recognition by virtue of this Act . . . of the validity of a divorce or legal separation obtained outside the British Isles may be refused if, and only if— (*a*) it was obtained by one spouse— (i) without such steps having been taken for j giving notice of the proceedings to the other spouse as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or (ii) without the other spouse having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to the matters aforesaid, he should reasonably have been given; or (*b*) its recognition would manifestly be contrary to public policy.'

The case on behalf of the wife is put on two grounds, namely: (i) that by reason of the failure of the wife's Australian solicitors to comply with her instructions conveyed to them repeatedly over many months by her English solicitors to file an answer in the husband's suit, the matter proceeded undefended and the decree nisi of divorce, being expedited, became absolute before she was informed of the hearing or of the result; (ii) that by reason of the fact that the attention of the learned judge who heard the undefended suit on 15th October 1975 was not invited to a letter dated 1st October 1975 from the wife's English solicitors to the registrar of the Supreme Court, and received in his office and date stamped 7th October 1975, the learned judge did not have the opportunity of deciding whether or not to adjourn the hearing to enable the wife to file an answer and cross-petition and defend the suit. That letter summarised the instructions which had been given to the wife's Australian solicitors and enquired what steps could be taken to avoid the suit going against the wife by default.

It was argued on both these grounds that the wife had not been given such opportunity to take part in the proceedings as should reasonably have been given to her within the ambit of s 8(2)(*a*)(ii) of the 1971 Act, and also that recognition would be contrary to public policy within the ambit of s 8(2)(*b*).

I consider both these grounds on the footing that the voluminous correspondence passing between the wife's English solicitors and her Australian solicitors, as well as the evidence placed before me, establishes that it was at all times the wife's settled intention to file an answer and cross-petition, and to defend the suit unless a satisfactory agreement could be reached between the parties as to financial provision for her. Also, for the reasons set out in the foregoing part of this judgment, I approach this part of the case on the basis that the wife had, and has, strong grounds for asserting that, if the suit had been defended and all relevant evidence placed before the court, the husband's suit would have failed on the ground of desertion, and that a decree would probably have been granted to her on the grounds at least of her husband's desertion and adultery. This approach necessarily assumes that at the relevant time Australian law in regard to desertion and proof of adultery was similar to English law.

There can be no doubt that the wife and her English solicitors were given ample notice of the Australian proceedings instituted by the husband's petition of 30th July 1974. She was personally served with the petition and the form of notice on 14th October 1974. The notice warned her of the necessity to file an answer within the time fixed by the rules, and that if she failed to do so, the proceedings would be heard and an order made in her absence. This notice also informed her that, if she wished to defend the proceedings, she could apply for some provision towards her costs of so doing, including the cost of travel to Australia. Her English solicitors were further told, by letter from the court dated 9th December 1974, that without an order or the written consent of the petitioner's solicitors, the last day for filing the answer was 25th December 1974, and that unless an answer were filed the hearing of that suit would probably take place 'some time after March 1975'. In a reply to a letter from the wife herself, she was informed by letter from the court dated 22nd September 1975 that 'on present indications this suit should be heard in 7-8 weeks' time' undefended. In fact it was heard in three weeks' time on 15th October 1975. It was in reply to this letter that the wife's English solicitors wrote the letter of 1st October 1975 to the court, and referred to above. In these circumstances, no complaint is made on behalf of the wife of lack of notice of the proceedings within the ambit of s 8(2)(*a*)(i) of the 1971 Act.

The wife does, however, allege that the decree was made against her in an undefended suit, and without an order for financial provision, because of the failure of her Australian solicitors to comply with explicit instructions given to them by her English solicitors to file an answer, so that she could defend the suit. The object of this allegation on behalf of the wife is solely to attempt to establish that she was not