On those grounds,

THE COURT

in answer to the question referred to it by the Bundesgerichtshof by order of 22 May 1978, hereby rules:

Judicial decisions authorizing provisional protective measures — such as the placing under seal or the freezing of the assets of the spouses — in the course of proceedings for divorce do not fall within the scope of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgment in Civil and Commercial Matters as defined in Article 1 thereof if those measures concern or are closely connected with either questions of the status of the persons involved in the divorce proceedings or proprietary legal relations resulting directly from the matrimonial relationship or the dissolution thereof.

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 27 March 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 22 FEBRUARY 1979

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling ordered by the Bundesgerichtshof under the Protocol of 3 June 1971 on the interpretation by the Court of the Convention of 27 September 1968 on Jurisdiction and Enforcement of

Judgments in Civil and Commercial Matters.

The question raised by the reference concerns the field of application of the Convention and, more particularly, the scope of the exceptions from that field made by subparagraph 1 of the second paragraph of Article 1 for matters relating to "the status ... of natural persons" and "rights in property arising out of a matrimonial relationship".

As Your Lordships know, the Convention is at present in force only in the original Member States and the only authentic texts of it are the German, French, Italian and Dutch texts. It has been my practice, in Opinions dealing with pre-1973 Community instruments of which there has been no authentic English text, to refer to the French text. Your Lordships also know, however, that a Convention on the Accession of the new Member States to the 1968 Convention and to the Protocol on its interpretation by the Court was signed at Luxembourg on 9 October 1978 ("the Accession Convention"). Versions of the original Convention and Protocol in Danish, English and Irish are annexed to the Accession Convention and Article 37 of the Convention provides that those versions "shall be authentic under the same conditions as the original texts of the 1968 Convention and the 1971 Protocol". That being so I propose to cite from what is to become, when ratification of the Accession Convention is complete, the authentic English text. There is this advantage in my doing so that that text shows to some extent what the authors of the Accession Convention (at least) thought that the original Convention meant.

I turn to the facts of the present case.

On 12 January 1977 M. Jacques de Cavel ("the husband") instituted, in the Tribunal de Grande Instance of Paris, proceedings against his wife, Mme. Luise de Cavel ("the wife") for divorce. The husband is a French citizen, working in Frankfurt-am-Main. The wife is of German origin. They had a flat in Frankfurt and another in Cannes. It seems that in November 1976 the wife caused to be removed from the flat in Cannes, and to be sold for her benefit, some valuable carpets which the husband claims were his. He also alleges that, when he returned to Frankfurt from holiday at the beginning of January 1977, he found that a number of objects had similarly been removed from the flat there and from his office. On the strength of those allegations, he coupled with his divorce petition an application to the Tribunal de Grande Instance of Paris for protective measures ("mesures conservatoires").

On 19 January 1977 the Judge in Matrimonial Matters ("Juge aux Affaires Matrimoniales") of the Tribunal ordered, first, the placing of seals ("l'apposition des scellés") on the furniture and effects in the flat in Frankfurt and on a safe deposit box hired in the wife's name at a bank in Frankfurt and, secondly, the freezing ("saisie arrêt") of two accounts in the wife's name with banks in Frankfurt. It is, I think, common ground that that order was made *ex parte* and that it was made under Article 257 of the French Civil Code, which empowers a Judge to order emergency measures ("des mesures urgentes") as soon as a divorce petition has been filed. Reference was made, in the course of argument, to Article 220 of the Code, which enables such measures to be ordered independently of divorce proceedings, but an order under that Article can be made only by the President of the Tribunal, and the order here in question was not made by him.

The husband applied to the Landgericht of Frankfurt for enforcement under Article 31 of the 1968 Convention of the order of 12 January 1977. On 3 May 1977 his application was rejected by that Court on the ground that documents had not been produced, as required by Article 47 of the Convention, to show that "according to the law of the State in which it has been given, the Judgment is enforceable and has been served".

The husband appealed to the Oberlandesgericht of Frankfurt which, in its turn, refused to enforce the order, on the different ground that interim measures adopted in the course of divorce proceedings form part of those proceedings and must, therefore, be regarded as measures relating to the status of natural persons which, under the second paragraph of Article 1 of the Convention, fall outside its field of application. In the view of the Oberlandesgericht it made no difference that the object of the measures was to protect interests of a proprietary nature, since the same paragraph refers explicitly to "rights in property arising out of a matrimonial relationship".

The husband now appeals to the Bundesgerichtshof, which has referred to this Court the question whether, to put it shortly, the 1968 Convention is inapplicable to an order such as that made by the French Judge in this case, on the grounds that that order was made in proceedings relating to personal status or rights in property arising out of a matrimonial relationship.

For the purposes of their arguments the Commission, the German Government and the United Kingdom Government broke that question down into two:

(1) Can the 1968 Convention apply to an ancillary order made in proceedings in which the substantive claim is outside the scope of the Convention; more particulary can the Convention apply to an order for interim measures made in divorce proceedings?

(2) If the answer to the first question is "yes", do measures of the kind ordered by the French Judge in the present case relate to "the status of natural persons" or to "rights in property arising out of a matrimonial relationship" within the meaning of those phrases in the second paragraph of Article 1 of the Convention?

The United Kingdom Government submitted that the first question should be answered in the negative. In support of that submission it put forward four main arguments:

(i) There are wide differences both in the bases on which courts of Member States assume jurisdiction over divorce and in the grounds (if any) on which they will allow a marriage to be dissolved. That is the primary reason for the exclusion of matters relating to the status of natural persons from the scope of the Convention. Because divorce laws are rooted in deeply held social, moral and religious attitudes, the courts of one country may find it difficult to assist the courts of another country in exercising that jurisdiction. It would be illogical and contrary to the spirit of the Convention if it nevertheless required ancillary orders made in the exercise of the same jurisdiction to be enforced by the courts of another country.

(ii) Since divorce proceedings are outside the Convention, a court entertaining such proceedings does not have to comply with the rules of the Convention concerning jurisdiction over persons domiciled elsewhere in the Community. It follows that an ancillary order might be made in divorce proceedings by a court lacking jurisdiction under the Convention to make the order. There would be no means of checking on this, because Article 28 of the Convention prevents re-examination of the basis of jurisdiction.

(iii) Jurisdiction to make ancillary orders falling within the scope of the Convention would have to be based on the rules of the Convention itself. A court exercising divorce jurisdiction on a ground not generally authorized by the Convention would be deprived of its power to make ancillary orders of that kind in the proceedings.

(iv) Article 5 (2) of the Convention gives jurisdiction "in matters relating to maintenance" to "the courts for the place where the maintenance creditor is domiciled or habitually resident". It is amended by the Accession Convention which adds the following:

"or if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain these proceedings, unless that jurisdiction is based solely on the nationality of one of the parties."

That amendment would have been unnecessary, the United Kingdom Government submits, if maintenance proceedings ancillary to status proceedings already fell within the scope of the Convention.

Those are powerful arguments, particulary to my mind the second and the third. I have however come to the conclusion that, on balance, they are outweighed by considerations urged upon us by the Commission and by the German Government.

The first paragraph of Article 1 of the Convention expressly provides that the answer to the question whether or not the Convention applies in a particular case does not depend on "the nature of the court or tribunal" concerned. The subsequent provisions of the Convention seem to me to make it clear that the answer to that question does not in general depend on the nature of the proceedings either. In general the determining factor is the subject-matter of the case. To that general principle there are express exceptions, such as those for bankruptcy and analogous proceedings, and for arbitration, in subparagraphs 2 and 4 of the second paragraph of Article 1.

That is as one would expect. It would be odd if the applicability of the Convention depended on the particular forum or type of procedure chosen by the plaintiff, petitioner or other claimant; if, for instance, in the present case, the situation would have been different if the husband had applied to the President of the Tribunal under Article 220 of the Civil Code independently of divorce proceedings or if the enforceability of an order of the High Court in England, designed to preserve property owned by a husband and wife in common, were to depend on whether it was made by the Chancery Division in the exercise of its

equitable jurisdiction (as in *Waller* v *Waller* [1967] 1 WLR 451) or by the Family Division in the course of divorce proceedings.

In my opinion the United Kingdom Government's interpretation of Article 5 (2) of the Convention and of the effect of the amendment thereof to be made by the Accession Convention are mistaken. Article 5 (2) as it stands at present makes an exception to the general rule in Article 2 that a person is to be sued in the courts of the State where he is "domiciled". That exception is to the effect that a "maintenance creditor" may also sue in the courts of a State where he or she is domiciled or habitually resident. Article 5 (2) is silent on the question whether the Convention applies to a maintenance order made in divorce proceedings. Professor Schlosser's Report on the draft of the Accession Convention (paragraph 32) identifies the reason for that as being that when the 1968 Convention was drawn up the principle still applied in the original Member States that maintenance proceedings could not be combined with proceedings relating to status. Since 1968, however, widespread reforms of family law in those States have led to an increasing number of combined proceedings there. The result may be seen in the Judgment of 4 June 1976 of the Oberlandesgericht of Karlsruhe in *B.K.* v *P.K.* (2 W 7/76 — Synopsis of Case Law on the 1968 Convention, Part 2, No 54). The Oberlandesgericht had no difficulty in holding that a maintenance order made by the Tribunal de Grande Instance of Paris in divorce proceedings was enforceable under the Convention. Indeed the Oberlandesgericht thought the point too clear to warrant a reference to this Court. On that view the effect of the amendment to Article 5 (2) must be that a court of a Member State which is neither that of the domicile of the "maintenance debtor" nor that of the domicile or habitual residence of the "maintenance creditor" will have power to make an order in the latter's favour provided that the order is made as an ancillary matter in proceedings concerning the status of a person that that court has jurisdiction to entertain according to its own law and provided that that jurisdiction is not based solely on the nationality of one of the parties.

The Commission and the German Government found support for their interpretation of Article 1 (with which I agree) in other provisions of the Convention, notably Article 42, Article 5 (4) and Article 24.

The first paragraph of Article 42 provides:

"Where a foreign judgment has been given in respect of several matters and enforcement cannot be authorized for all of them, the Court shall authorize enforcement for one or more of them."

That appears to mean that, where a judgment covers matters that are and matters that are not within the Convention, enforcement is to be ordered in respect of those that are. It would seem to be inconsistent with the approach there evinced to hold that an ancillary order relating to a matter within the Convention cannot be enforced if made in proceedings relating also to matters outside the Convention.

Article 5 (4) gives a court seized of criminal proceedings jurisdiction to hear civil claims for damages or restitution based on the act giving rise to those proceedings. That is a case where the Convention expressly applies to an ancillary proceeding, although the main proceedings clearly fall outside its scope.

Article 24 I shall have to advert to, later, in a different context. On the present point it seems to me neutral.

I turn to the second question.

As to that it seems to me abundantly clear that an order of the kind made by the French Judge in the present case does not relate to the status of any natural person. It relates only to property. So the real question is whether it relates to "rights in property arising out of a matrimonial relationship".

In approaching that question is confronted with two main difficulties.

The first is that, as the Commission pointed out to us, the phrases corresponding to "rights in property arising out of a matrimonial relationship" in the texts of the Convention in the several official languages do not all have the same meaning. It seems that the phrase in the German text "ehelicher Güterstand" is especially narrow.

Secondly there is a great disparity, even among the legal systems of the original Member States, in the rules governing proprietory relationships between spouses. In all of those States, it seems, such relationships are governed by "regimes" each consisting of a more or less comprehensive set of rules, e.g. "community of property", "separation of property" or "community limited to after-acquired property", for which couples are required to opt at the time of their marriage. In some countries (e.g. Germany) the regime applicable to a particular couple can be changed subsequently. In others it cannot. In some countries (e.g. France) there are rules, referred to as the "régime matrimonial primaire", that apply irrespective of the particular regime opted for. In others there are not. Moreover the rules applicable under each regime differ from country to country. In the result it is never possible to determine without detailed enquiry what a spouse's rights over particular property are, nor the extent to which those rights are derived from the general law or from the relevant matrimonial regime. With the accession to the Convention of Ireland and the United Kingdom, where such regimes are unknown but where a spouse's rights may also be derived wholly or partly either from the general law of property or from his or her position as a spouse (and in the latter case wholly or partly either from a marriage settlement or from general law applicable as between spouses) the disparities will be increased.

One thing is certain. It is that the very purpose of the Convention must be defeated if, in each case in which enforcement is sought in one Member State of a judgment of a court of another Member State, the court before which enforcement is sought has to enquire to what extent the property rights to which the judgment gives effect, or purports to give effect, are derived from a matrimonial regime, from a marriage settlement, from general matrimonial law, from the general law of property, or (perhaps) from other branches of the general law. In order for the Convention to work as it is intended to, the Court before which enforcement is sought must be able to tell, virtually at a glance, whether the judgment is or is not one to

which the Convention applies. Moreover, in the case of an order for protective measures such as is here in question, an enquiry of that kind would be futile, since such an order is designed not to give effect to proprietory rights but merely to preserve the property to which it relates so that the respective rights of the spouses over that property may be effectively adjudicated upon later.

In the argument before us three solutions of the problem were canvassed.

One, which was the solution in favour of which the Commission came down, was to give to the phrase "rights in property arising from a matrimonial relationship" a very narrow interpretation, confining it to matters relating to the adoption, existence or dissolution of a matrimonial regime, and to exclude any question as to rights arising from the existence or dissolution of such a regime. That solution might, I suppose, be workable in the period before the entry into force of the Accession Convention and it may be consistent with the four now authentic texts of the 1968 Convention. But it would not be workable after the entry into force of the Accession Convention and would be irreconciliable with what will then be the English text of Article 1. In other words it would defeat the expressed intention of the authors of the Accession Convention, unless one were to hold that the entry into force of the Accession Convention will alter the meaning of Article 1.

The second possible solution was to interpret the phrase "rights in property arising from a matrimonial relationship" quite literally as excluding any rights subsisting between spouses that would have existed as between them even had they not been married. No-one, as I understood the arguments, actually supported that solution. Its adoption would be incompatible with the purpose of the Convention as a whole for the reason, which I alluded to a moment ago, that it would require in each case an enquiry by the enforcing court into the sources of the rights to which the judgment was intended to give effect.

There remains only the solution contended for by the German Government (if I understood it rightly), by the United Kingdom Government (albeit briefly) and on behalf of the wife. This is to give to the phrase a broad meaning, on the footing that, in practice, in few disputes between spouses about property is it likely that the "matrimonial relationship" between them will play no part. A case in which that relationship plays no part can no doubt occur, but then that fact can be made clear in the judgment, and will no doubt be made clear in it if it is widely enough known among the legal profession and among Judges in the Member States that that is a precondition to the judgment's enforceability under the Convention in other Member States.

The upshot is that, in my opinion, a judgment or order relating to a property dispute between spouses should be presumed to be outside the scope of the Convention unless it is apparent on the face of the particular judgment or order in question that it is not.

I do not overlook the argument of the Commission that that interpretation must necessarily restrict the field of application of the Convention. That does

not however mean that it is not the right interpretation, as is borne out by the Judgment that Your Lordships have just delivered in Case 133/78 *Gourdain* v *Nadler*, where a like argument was put forward by the Commission.

It was also argued on the Commission that such an interpretation would be inconsistent with the fact that the Convention applies to maintenance orders. I do not think so. Maintenance orders are, in general, orders for the payment of money. They operate *in personam* and do not affect property rights, except where secured maintenance is ordered, but then the affection of property is of a limited and special kind.

The Commission further submitted that that interpretation would be inconsistent with the deliberate departure by the authors of the 1968 Convention from the text of The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters which refers, in the provision corresponding to subparagraph 1 of the second paragraph of Article 1 of the 1968 Convention, to "the status or capacity of persons or questions of family law, including personal or financial rights and obligations between parents and children or between spouses". One has only, however, to turn to M. Jenard's Report on the draft of the 1968 Convention (Chapter III, para. IV (A)) to see why its authors made that departure. Their reasons had nothing to do with the present issue, except in so far as they wished to make the Convention apply to maintenance orders.

Virtually the whole of the argument submitted to us on behalf of the husband rested on Article 24 of the Convention, which reads as follows:

"Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter."

In my opinion that Article is not in point, because it applies only where under the Convention jurisdiction as to the substance of a particular matter is allocated to the courts of a particular "Contracting State". In other words Article 24 does not apply where "the substance of the matter" is outside the field of application of the Convention. It would be astonishing if it were otherwise, because it would mean that, in cases outside the scope of the Convention, the courts of the Member States were nonetheless bound to enforce each other's provisional orders.

In the result I am of the opinion that, in answer to the question referred to the Court by the Bundesgerichtshof, Your Lordships, should rule that an order for protective measures made by a court of a Member State in proceedings for divorce is not, on the mere ground that it is made in such proceedings, outside the scope of the Convention of 27 September 1968, but that, where the order relates to property that is the subject-matter of a

dispute between the parties of those proceedings, that order must be taken to be outside the scope of the Convention unless it appears on the face of the order that the rights in dispute arise independently of the matrimonial relationship between the parties.