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## ANNULMENT JURISDICTION AND LAW: VOID AND VOIDABLE MARRIAGES

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### §1. *Introductory*

The decision of the Court of Appeal in England in *De Reneville v. De Reneville*<sup>1</sup> is important not only on account of the decision itself, but also on account of the reasons for judgment of Lord Greene M.R. (with whom Somervell L. J. concurred) and Bucknill L. J. The decision disposes of one question of jurisdiction, and the reasons (especially those of Lord Greene) cover various questions, upon which there have been conflicting decisions of single judges. The occasion seems to be a good one for taking stock, so to speak, in a department of the conflict of laws which has been in a somewhat confused state. The *De Reneville* case in the Court of Appeal has already been the subject of some articles or comments.<sup>2</sup>

The facts of the *De Reneville* case and the decision of the Court of Appeal may be summarily stated at this point by way of introduction to the subsequent discussion, fuller consideration of the effect of the decision and of the reasons for judgment being reserved till later. The marriage was celebrated in France in 1935, and until 1939, except for a few months, the parties resided together in France, the French Congo and Algeria. The woman was born in England, of English parents, and from 1939 until the commencement of the suit resided in England. The man, of French nationality, was domiciled in France and resided there at all material times. The woman sued the man in England for the annulment of the marriage on the ground of the incurable incapacity of the man or, alternatively, on the ground of his wilful refusal to consummate the marriage. Whether

<sup>1</sup> [1948] P. 100, affirming the decision of Jones J., [1947] P. 168.

<sup>2</sup> R. H. Graveson, *Recent Developments in Nullity of Marriage* (1948), 12 *Conveyancer and Property Lawyer* 185; case comment by F. Kent Hamilton (1948), 26 *Can. Bar Rev.* 875. -

the marriage was void or voidable on either of these grounds was, in the opinion of the court, a question to be determined by the law of France, that is, the law of the husband's domicile at the time of the marriage or the law of the matrimonial domicile; but, in the absence of evidence to the contrary, French law was presumed to be the same as English law, and by English law the marriage was not void *ab initio* but was merely voidable, whether on the ground of incapacity or on the ground (as provided in s. 7 (1)(a) of the Matrimonial Causes Act, 1937) of the man's wilful refusal to consummate the marriage. The decision of the Court of Appeal was that the fact that the petitioner was resident in England was not sufficient to confer jurisdiction upon an English court to entertain the petition in view of the fact that the respondent was domiciled and resident in France. In the circumstances only a French court would have jurisdiction.

## § 2. Jurisdiction of Courts

In order to estimate the effect of the *De Reneville* case in the setting of the former case law we must now go back to the year 1930, when the important case of *Inverclyde v. Inverclyde*<sup>3</sup> was decided by Bateson J. The marriage was celebrated in England in 1929, and in 1930 the woman sued in England for a declaration of nullity of the marriage on the ground of the impotence of the man, alleging in her petition that she was domiciled in Scotland and resident in England, and that he was domiciled in Scotland and had places of residence in England and Scotland. The respondent appeared under protest on the ground that the court had no jurisdiction. The argument for the respondent, accepted as "sound" by Bateson J., was that impotence differs from other grounds of nullity, such as illegality or informality, as regards annulment jurisdiction. If, for example, a marriage is bigamous, or if any essential element is lacking in the formalities of celebration, a declaration of nullity is merely the judicial ascertainment of a fact, namely, that there never has been any marriage; the marriage is void *ab initio* without regard to the intention or desire of the parties to affirm it or impeach it. On the other hand, impotence is merely a ground upon which one of the parties to the marriage may, if he or she chooses, and as a general rule, obtain an annulment decree; the marriage is voidable, not void, and unless already avoided, becomes unimpeachable on the death of either party. In the case of a voidable marriage, a so-called nullity

<sup>3</sup>[1931] P. 29.

decree is really a decree dissolving an existing marriage and changing the status of the parties, and consequently, if the principle is sound that domicile is the sole basis of divorce jurisdiction, the same principle is applicable to annulment for impotence. Bateson J. therefore dismissed Lady Inverclyde's petition.

The *Inverclyde* case was followed by a single judge in Ontario in *Fleming v. Fleming*,<sup>4</sup> and in British Columbia in *Shaw v. Shaw*.<sup>5</sup> In the latter case, on appeal,<sup>6</sup> all that the Court of Appeal for British Columbia found it necessary to decide was that a British Columbia court has no jurisdiction to annul a marriage on account of impotence if the petitioning wife is resident in the province, but the respondent is neither resident nor domiciled there, and the marriage was celebrated elsewhere. These grounds would justify the decision in the *Fleming* case without reliance on the alleged principle that only a court of the domicile has jurisdiction, and the Ontario and British Columbia cases are in the result in accord with the decision of the Court of Appeal in the *De Reneville* case. In Manitoba in *W. v. W.*<sup>7</sup> the parties were found to be domiciled in the province, and in accordance with the *Inverclyde* case the Court of Appeal, on the petition of the wife, annulled the marriage on account of the husband's impotence, reversing the judgment of the trial judge who had held that the petition was a proceeding for the dissolution, as distinguished from the annulment, of a marriage.

In England two single judges have declined to follow the *Inverclyde* case, and have held that there is no difference between void marriages and voidable marriages in the matter of jurisdiction of courts. In *Easterbrook v. Easterbrook*,<sup>8</sup> an undefended case, Hodson J. held that he had jurisdiction to annul a marriage celebrated in England between the petitioner, a soldier serving in the Canadian forces in England, but domiciled in one of the provinces of Canada,<sup>9</sup> and an Englishwoman, held to be domiciled in England, but obviously domiciled in some Canadian province since the marriage was not void, but was merely voidable. The ground of annulment was the wilful

<sup>4</sup> [1934] O.R. 588, [1934] 4 D.L.R. 90.

<sup>5</sup> (1945), 61 B.C.R. 40, [1945] 1 D.L.R. 413, [1945] 1 W.W.R. 156.

<sup>6</sup> (1945), 62 B.C.R. 52, [1945] 3 W.W.R. 577, [1946] 1 D.L.R. 163. See also footnote 24, *infra*.

<sup>7</sup> (1934), 42 Man. R. 578, [1935] 1 W.W.R. 293 (C.A.), reversing [1934] 3 W.W.R. 230.

<sup>8</sup> [1944] P. 10.

<sup>9</sup> The judge spoke of him, somewhat inaccurately, as "domiciled in Canada".

refusal of the respondent to consummate the marriage, a ground of annulment created in England by the Matrimonial Causes Act, 1937, not being a ground of annulment by the law of England before the statute<sup>10</sup> and not being a ground of annulment by the law of any province of Canada, that is, by the law of the husband's, and therefore the wife's, domicile.<sup>11</sup> Both parties were resident in England at all material times, and it would appear that on this ground Hodson J. may have been right in holding that he had jurisdiction.<sup>12</sup> He was, however, unfortunate in his selection of *White v. White*<sup>13</sup> as his main authority. That decision may also have to be regarded as right in the light of the reasons for judgment given in the *De Reneville* case,<sup>14</sup> but the *White* case related to a marriage void *ab initio* and the jurisdiction was based on the domicile of the petitioner in England, and it had no bearing on the *Easterbrook* case. *Hutter v. Hutter*<sup>15</sup> was similar in most respects to the *Easterbrook* case. Both parties were resident in England and the marriage was celebrated there. The petitioner was a soldier serving in the United States army in England, but domiciled in some state of the United States,<sup>16</sup> and therefore, as the ground of annulment was the same as in the *Easterbrook* case, the marriage was voidable, not void, and the wife was domiciled in some state of the United States. As it does not appear in what state the parties were domiciled, it is impossible to say whether the particular ground of annulment would be a ground of annulment by the law of the domicile. The case was undefended, but Pilcher J. caused the papers to be forwarded to the King's Proctor and subsequently "had the advantage of listening to a full analysis of all the relevant authorities by the Attorney-General himself". After stating his reasons fully, he declined to follow the *Inverclyde* case, holding (1) that there is no difference between void marriages and voidable marriages in the matter of jurisdiction, and (2) that the residence of the parties in England confers jurisdiction, and he accordingly annulled the marriage. The case was cited in the Court of Appeal in the

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<sup>10</sup> *Napier v. Napier*, [1915] P. 184 (C.A.).

<sup>11</sup> As to the question of the proper law and the applicability of the law of the domicile, see §3, *infra*.

<sup>12</sup> The question was left open by the Court of Appeal in the *De Reneville* case.

<sup>13</sup> [1937] P. 111.

<sup>14</sup> The point will be discussed in connection with void marriages, *infra*.

<sup>15</sup> [1944] P. 95.

<sup>16</sup> The court said "domiciled in the United States", obviously meaning "domiciled in some state of the United States".

*De Reneville* case by Lord Greene,<sup>17</sup> who stated that he expressed no opinion on the question whether the residence of both parties in England would be a sufficient basis of jurisdiction. He did not express disapproval of the result in the *Hutter* case, so that the question whether the court has jurisdiction in these circumstances has been answered affirmatively by single judges in the *Easterbrook* and *Hutter* cases, but has not yet been answered by the Court of Appeal.

In *Robert v. Robert*<sup>18</sup> the ground of annulment was the same as in the *Easterbrook* and *Hutter* cases, but the facts differed in that in the *Robert* case the petitioning wife only was resident in England, the respondent being resident and domiciled in Guernsey. An English court held that it had jurisdiction and annulled the marriage. Now, in the *De Reneville* case the Court of Appeal has decided that in circumstances similar to the *Robert* case the court has no jurisdiction, and consequently the *Robert* case is overruled. In other words, the mere residence of the petitioning wife in England does not confer jurisdiction on an English court to annul a voidable marriage if the respondent is domiciled and resident elsewhere. On similar grounds the Court of Appeal has approved the decision in the *Inverclyde* case in the result, apparently assuming that in that case the respondent was domiciled and resident in Scotland,<sup>19</sup> and therefore the rejection of jurisdiction based solely on the petitioning wife's residence in England was justified.

In approving the decision in the *Inverclyde* case in the result the Court of Appeal in the *De Reneville* case has not approved the main thesis of the *Inverclyde* case, namely, that the sole basis of jurisdiction to annul a voidable marriage is the domicile of the parties (that is, the domicile of the husband), because the Court of Appeal has declined to express any opinion on the question whether the *Easterbrook* and *Hutter* cases were right in holding that the residence of both parties is a sufficient basis of jurisdiction. On the other hand the Court of Appeal has not approved the main thesis of the *Easterbrook* and *Hutter* cases, namely, that there is no difference between void and

<sup>17</sup> [1948] P. 100, at pp. 117, 118. At p. 108 he said, "we are not concerned here to consider cases (3), (5) or (6)", that is, jurisdiction based on (3) English residence of both parties, (5) the fact that the marriage took place in England, or (6) hardship.

<sup>18</sup> [1947] P. 164. See criticism of the *Robert* case by Garner, *Jurisdiction and the Choice of Law in Nullity Suits* (1947), 63 L.Q.R. 486.

<sup>19</sup> Notwithstanding that Lady Inverclyde in her petition alleged that the respondent had places of residence in both England and Scotland, and that counsel for the petitioner stated that the respondent was actually in England at the date of the petition.

voidable marriages as regards annulment jurisdiction. Lord Greene refers to the *Hutter* case merely for the purpose of demonstrating that it "is no authority for the view that residence of the petitioner alone is sufficient [basis of jurisdiction]". Bucknill L. J. does not mention either the *Easterbrook* case or the *Hutter* case, but he discusses<sup>20</sup> the distinction between void and voidable marriages and points out that whether a marriage is void or voidable depends upon the proper law applicable to the particular ground for annulment relevant to the case, that is, specifically in the *De Reneville* case, impotence or (alternatively) wilful refusal to consummate the marriage.<sup>21</sup>

In connection with marriages alleged to be voidable, not void, we do not have to discuss separately questions of jurisdiction based on the domicile of the petitioner in England or on the domicile of the respondent in England, because the parties necessarily have the same domicile, and the court of the common domicile has jurisdiction, but these questions may have to be considered in connection with marriages alleged to be void *ab initio*. For the latter purpose the reasons for judgment in the *De Reneville* case indicate that the domicile of the petitioner in England is a sufficient basis of jurisdiction, and *White v. White*<sup>22</sup> is specifically approved on this ground, notwithstanding the chorus of criticism of which the decision has been the subject.<sup>23</sup> The decision in the Alberta case of *Finlay v. Boettner*<sup>24</sup> would be justified on the same ground, notwithstand-

<sup>20</sup> [1948] P. 100, at pp. 119 *ff.*

<sup>21</sup> The question of the proper law is discussed in §3, *infra*.

<sup>22</sup> [1937] P. 111.

<sup>23</sup> For critical comments, see J.H.C.M. (1937), 53 L.Q.R. 315; Kahn-Freund, in Annual Survey of English Law (1937) 320, 322; Cheshire, Private International Law (2nd ed. 1938) 22, 342, 343; T.C.T. (1938), 6 Cambridge L.J. 424; Hancock (1943), 21 Can. Bar Rev. 149, at pp. 154-155. Cheshire in his 3rd ed. (1947) 454 says that if jurisdiction was assumed on the ground of the petitioner's domicile in England the decision "may be commended on the score of justice and convenience, and as not too flagrant a break with principle".

<sup>24</sup> Reported *sub nom.* *Spencer v. Ladd, Finlay v. Boettner*, [1947] 2 W.W.R. 817, [1948] 1 D.L.R. 39. On the other hand, in the British Columbia case of *Gower v. Starrett*, [1948] 2 D.L.R. 853, [1948] 1 W.W.R. 529, Farris C.J. expressed his dissent from the decision in *Finlay v. Boettner* as regards the sufficiency of the domicile of the petitioner as a basis of jurisdiction. The judgment of Farris C.J. was delivered before the delivery of judgment by the Court of Appeal in England in the *De Reneville* case, but after consultation with his "brother judges" who "unanimously agree, after a complete examination of this judgment and full consideration thereof, that the findings in this case express the law as they will apply it in like cases until such time as the law is otherwise cited by a court whose judgment is binding on this court". The reasons for judgment of Farris C.J. include a review of the reasons for judgment in the Court of Appeal for British Columbia in the case of *Shaw v. Shaw* (footnote 6, *supra*). The decision of the Court of Appeal in the last-mentioned case did not turn on the point now under discussion, but some of the *dicta* were favourable to the opinion subsequently stated by Farris C.J. in *Gower v. Starrett*, *supra*.

ing that some of the dicta occurring in the judgment may be open to criticism. *A fortiori* the domicile of the respondent in England is a sufficient basis of jurisdiction as regards a void marriage. The domicile of both parties in England is of course sufficient, that is, in the case of a void marriage, if the woman resides in the country of the husband's domicile with the intention of permanent or indefinite residence there.<sup>25</sup>

As regards residence, distinguished from domicile, the residence of both parties in England is of course sufficient in the case of void marriages. The residence of the petitioner alone is insufficient, and the old, ill-reported, decision in *Roberts v. Brennan*<sup>26</sup> is finally disposed of in the reasons for judgment in the *De Reneville* case. The residence of the respondent is sufficient.

As regards marriages alleged to be void *ab initio*, appellate courts in Manitoba<sup>27</sup> and Ontario<sup>28</sup> have held that there are only three bases of annulment jurisdiction,<sup>29</sup> namely,

- (i) where the marriage was celebrated in England; or
- (ii) where the respondent is resident in England, not on a visit as a traveller and not having taken up that residence for the purpose of the suit; or
- (iii) where the parties to the marriage are domiciled in England.

In each of these cases, as the marriage had not been celebrated in the country of the forum and the wife was not resident there, the petitioner husband was placed in the dilemma that by proving the marriage to be void *ab initio* he made inapplicable the rule that a wife's domicile follows that of her husband and on the facts the wife was domiciled elsewhere, and therefore the court had no jurisdiction. If the petitioner had failed to prove the marriage to be void, the action would of course have been discussed on the merits. As it was, the dismissal of the action for want of jurisdiction involved an implied finding that the marriage was void. On the other hand, if the domicile of the petitioner in the country of the forum confers jurisdiction, in accordance with the opinion of the Court of Appeal in England in the *De Reneville* case, the petitioning husband was entitled to a declaration of the nullity of the marriage. This was the effect of the decision of Boyd McBride

<sup>25</sup> *Salvesen or von Lorang v. Administrator of Austrian Property*, [1927] A.C. 641.

<sup>26</sup> [1902] P. 143, 18 T.L.R. 467, 71 L.J. (P.) 74.

<sup>27</sup> *Hutchings v. Hutchings* (1930), 30 Man. R. 66, [1930] 4 D.L.R. 673, [1930] 2 W.W.R. 565 (bigamy).

<sup>28</sup> *Manella v. Manella*, [1942] O.R. 630, [1942] 4 D.L.R. 712 (insanity of woman); cf. comment by Hancock (1943), 21 Can. Bar Rev. 149.

<sup>29</sup> Applying rule 65 of Dicey, Conflict of Laws (5th ed. 1932).

J. in *Finlay v. Boettner*.<sup>30</sup> In *Spencer v. Ladd*<sup>31</sup> the same judge held that the fact that the marriage had been celebrated in the country of the forum confers jurisdiction, independently of any question as to the residence or domicile of the parties but, by his reference only to the seventh edition of Westlake, gave the impression that that author disapproved of this ground of jurisdiction. The following is, it is submitted, a more accurate statement:<sup>32</sup>

English courts have sometimes exercised jurisdiction to entertain a suit for the annulment of a marriage celebrated in England, though neither of the parties was either domiciled or resident in England,<sup>33</sup> but Westlake, while suggesting that the jurisdiction 'may be justified for the sake of correcting the civil register of the country'<sup>34</sup> doubts whether the jurisdiction should be based, as it formerly was, on the principle that the *forum rei gestae* is competent as such, the analogous jurisdiction in contract of the *forum contractus celebrati* having been abandoned in England. Bentwich, in later editions of Westlake,<sup>35</sup> doubts whether jurisdiction will any longer be entertained on the ground rarerly of the celebration of the marriage in England.<sup>36</sup>

### § 3. *Proper Law*

The decision of a single judge holding that he has jurisdiction in an undefended annulment case is in itself of relatively little weight as a precedent, but of course the reasons for judgment may make the decision of greater persuasive authority. Even when adequate reasons for judgment seem to be given, however, they have frequently been defective in that they relate solely to the question of the jurisdiction of the court, and pass over in silence the question of the proper law to be applied to the particular ground for annulment. The explanation is sometimes to be found in the fact that in an undefended case the plaintiff is usually not interested in any resort to foreign law and is content to rely upon the domestic rules of the law of the forum, and it either escapes the attention of the court that the proper law may be a foreign law or it does not occur to the court that it ought to mention that it is applying the domestic

<sup>30</sup> See *Spencer v. Ladd*, *Finlay v. Boettner*, in footnote 24, *supra*.

<sup>31</sup> See footnote 24, *supra*. To the same effect, see *Gower v. Starrett*, cited in footnote 34.

<sup>32</sup> Falconbridge, *Essays on the Conflict of Laws* (1947) 627.

<sup>33</sup> See, e.g., *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67.

<sup>34</sup> *Private International Law* (5th ed. 1912), § 49.

<sup>35</sup> 6th ed. 1923, §49; 7th ed. 1925, §49a.

<sup>36</sup> *De Gasquet James v. Mecklenburg*, [1914] P. 53, cited by Bentwich, related to a declaratory judgment of validity, and is not strictly relevant to the present question. In Quebec it has been held that the mere fact that a marriage was celebrated there does not confer jurisdiction in annulment: *Main v. Wright*, [1945] K.B. 105.

rules of the law of the forum because no party has alleged and proved any foreign law and that therefore the court must assume that any foreign law that might be the proper law is the same as the domestic law of the forum. The result is that undefended annulment cases are usually quite valueless with regard to the question of the proper law and sometimes may be quite misleading. It is even conceivable that, owing to the failure of a party to allege and prove a foreign law, the application of the domestic law of the forum may lead the court to hold that it has jurisdiction on the basis of the marriage being void *ab initio*, notwithstanding that the question whether the marriage is void or is merely voidable cannot be known until the proper law is selected and its provisions ascertained, and that possibly the court has no jurisdiction if the marriage is merely voidable.

For example, the failure of the court in the *Easterbrook* and *Hutter* cases<sup>37</sup> to discuss the question of the proper law or to explain why it applied the domestic law of England compels us merely to conjecture that it applied that law because no party alleged and proved any foreign law and therefore the court applied that law on a presumption that the proper foreign law was the same as the domestic law of the forum. In connection with another topic, namely, torts in the conflict of laws, I have in another place made some observations on this presumption,<sup>38</sup> and these observations are also applicable to annulment of marriage. Presumptions are sometimes inevitable and sometimes useful, but sometimes they are unsatisfactory. It may, for example, be unsatisfactory if the use of a presumption leads to a result which is unreal in the sense that it does not correspond with known fact. As between two common-law countries a presumption of identity of laws is generally reasonable, because it corresponds, approximately at least, with fact, but the presumption ought not to be extended to changes in the common law made by statute,<sup>39</sup> and therefore ought not to be extended so as to justify an English court in presuming that the law of the foreign domicile includes a provision corresponding with the provision of the Matrimonial Causes Act, 1937,

<sup>37</sup> See footnotes 8 and 15, *supra*.

<sup>38</sup> *Essays on the Conflict of Laws* (1947) 684, 685, reproducing a comment originally published (1939), 17 *Can. Bar Rev.* 546.

<sup>39</sup> *Purdum v. Pawey* (1896), 26 *Can. S.C.R.* 412, at p. 417, *Strong C.J.*: "Then we cannot presume that the law of Oregon corresponds with the present state of our own statutory law" (that is, Ontario statutory provisions relating to conveyances made in fraud of creditors); *cf. Pink v. Perlin & Co.* (1898), 40 *N.S.R.* 260.

rendering a marriage voidable on the ground of wilful refusal to consummate the marriage. Again, if the foreign law is not merely a technically foreign law in the sense of the law of any country other than that of the forum, but is essentially a foreign law, as, for example, if the *lex fori* and the foreign law are based on the common law and the civil law respectively, or *vice versa*, a presumption of identity of the two laws is quite likely to lead to a result which is unreal in the sense that it does not correspond with fact. If there exists in the English system of the conflict of laws a presumption, universally applicable, that foreign law is the same as English law unless alleged and proved to be different, then it is submitted that the existence of this presumption constitutes a major defect in the system.<sup>40</sup>

Whatever be the explanation, there has been a marked tendency on the part of the courts in undefended cases to ignore completely the question of the proper law, even though in some cases the facts suggest that the proper law may be a foreign law. The result has been to convey to the unwary reader the impression that in an annulment case, once it is decided that the court has jurisdiction, it should as a matter of course apply the domestic law of the forum, as it does in a divorce case. There is, however, one ground of invalidity as regards which it is obvious that the proper law is not the domestic law of the forum as such, but is the law of the place of celebration, and as regards which the question of the proper law is forced upon the attention of the court and consequently is not ignored. This ground of invalidity is the failure to comply with imperative requirements of the law with regard to formalities of celebration of the marriage,<sup>41</sup> and what those requirements are cannot be known in any way except by resort to the law of the place of celebration. Usually the marriage would be void *ab initio*, not voidable, but this would depend on the *lex loci celebrationis*. The broad distinction drawn between questions of formal validity of a marriage and questions of intrinsic validity is well known in most systems of the conflict of laws, the former being governed by the *lex loci celebrationis* and the latter by the personal law of the parties, that is, the *lex domicilii* in some

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<sup>40</sup> For a criticism of the rigidity of the English rule, see Johnson, *Conflict of Laws*, Vol. 1 (1933) 58 ff.

<sup>41</sup> There may of course be a difficult problem of characterization on the question what is included in formalities within the meaning of the relevant conflict rule construed in the light of the provisions of the proper law. Cf. footnote 62, *infra*.

countries and the *lex patriae* in others.<sup>42</sup> If a marriage is attacked on some ground other than that it is formally invalid, the problem of the proper law is more troublesome, and merits further discussion. For example, in the *Easterbrook* and *Hutter* cases the judges' attention was concentrated on the point that the jurisdiction of a court of the domicile of the parties to annul a voidable marriage is not exclusive, and it seems to have escaped their notice that the law of the domicile was nevertheless the proper law, with the result that they granted annulment upon a ground (wilful refusal to consummate the marriage) which had been made a ground for annulment in domestic English law by the Matrimonial Causes Act, 1937, but which was not a ground of annulment by the law of the domicile of the parties in the *Easterbrook* case and may not have been a ground of annulment by the law of the domicile of the parties in the *Hutter* case.<sup>43</sup>

The tendency of the courts, already mentioned, to ignore the question of the proper law in undefended annulment cases met with some criticism by non-judicial writers after the decision in the *Easterbrook* case (the criticism being equally appropriate to the *Hutter* case) as, for example, the following:<sup>44</sup>

A further point may be raised by cases like *Easterbrook v. Easterbrook*, where it is not the court of the domicile which decides the issue. This is the question what law is to be applied to the decision of the case. In the [*Easterbrook*] case English law was applied (s. 7(1), Matrimonial Causes Act, 1937), but counsel for the petitioner did not plead foreign law, and the report does not state whether the court applied English law *qua lex fori*, *lex loci celebrationis*, or law of the respondent's domicile, or whether English law was applied as the law of the petitioner's domicile following the maxim that in the absence of proof to the contrary foreign law is presumed to be the same as English law on the point in issue. It would be interesting to see what decision the court would give in a case where all other facts being the same as in *Easterbrook v. Easterbrook* counsel for the petitioner applied for a nullity decree on a ground not existing<sup>45</sup> in English law, but prevailing in the law of the petitioner's domicile. Perhaps the consideration of this problem may be an additional argument in favour of the adoption of exclusive jurisdiction in nullity cases by the court of the putative husband's domicile.

<sup>42</sup> For an exhaustive comparative study of the laws of various countries, see especially Rabel, *The Conflict of Laws*, Vol. 1 (1945) 207, and the whole of his chapters 7 and 8.

<sup>43</sup> Cf. my *Essays on the Conflict of Laws* (1947) 681, 682.

<sup>44</sup> F.H. (1944), 60 L.Q.R. 115, at p. 116, quoted in my *Essays on the Conflict of Laws* (1947) 681, 682 (reproducing my comment on the *Hutter* case (1944), 22 Can. Bar Rev. 923); Cheshire, *Private International Law* (3rd ed. 1947) 446, 447, 458.

<sup>45</sup> E.g., fundamental mistake in German law; see *Mitford v. Mitford*, [1923] P. 130.

The case of *Robert v. Robert*,<sup>46</sup> already noted as having been disapproved in the result by the Court of Appeal in the *De Reneville* case,<sup>47</sup> is noteworthy and valuable because Barnard J. specifically discussed the question of the proper law as a question separate from that of jurisdiction, and the case has been the subject of non-judicial comment,<sup>48</sup> both before and after the judgment of the Court of Appeal in the *De Reneville* case<sup>49</sup> in which also the question of the proper law was discussed.

At this point it seems desirable, in order to clear the air so to speak, to discuss some matters that may seem at first sight to be matters of mere verbal distinctions, but may really be matters of substantial importance. The following passage from the judgment of Lord Greene in the *De Reneville* case<sup>50</sup> may be usefully quoted by way of introduction to the discussion:

In my opinion, the question whether the marriage is void or merely voidable is for French law to answer. My reasons are as follows: The validity of a marriage so far as regards the observance of formalities is a matter for the *lex loci celebrationis*. But this is not a case of forms. It is a case of essential validity. By what law is that to be decided? In my opinion by the law of France, either because that is the law of the husband's domicile at the date of the marriage or (preferably, in my view) because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage.

Leaving for a moment the discussion of Lord Greene's reference to the law of the "matrimonial domicile", I have quoted the foregoing passage on account of his use of the expression "essential validity". It seems that he is emphasizing the distinction between a question of formal or extrinsic validity and a question of intrinsic validity. No doubt the expression "essential validity" is in common use in connection with both marriage and contract in the sense of intrinsic validity, but the expression is open to criticism because if a marriage is void by reason of failure to comply with imperative requirements of the *lex rei celebrationis* as to formalities, it would seem to be not incorrect to speak of these requirements as being "essential" or to speak of the marriage as being "essentially" invalid. Indeed the view has been advanced by one writer<sup>51</sup> that the use of the word "essential" is correct only if it relates to a

<sup>46</sup> [1947] P. 164.

<sup>47</sup> Footnotes 18 and 19, *supra*.

<sup>48</sup> See G. D. Kennedy (1947), 25 Can. Bar Rev. 1012; Fleming (1948), 11 Mod. L. Rev. 98.

<sup>49</sup> See footnote 1, *supra*.

<sup>50</sup> [1948] P. 100, at p. 114.

<sup>51</sup> Graveson, Recent Developments in Nullity of Marriage (1948), 12 Conveyancer and Property Lawyer 185, at p. 188.

cause for annulment which renders the marriage void *ab initio*, and therefore that its use in connection with a voidable marriage is incorrect. A voidable marriage, he submits, is not essentially invalid.

Furthermore, the words "validity" and "invalidity" require further elucidation. It is possible of course to argue that only a marriage that is void *ab initio* is "invalid", and that a voidable marriage is not invalid, because it is valid until it is avoided by a competent court and may become unimpeachable. It seems simpler, however, to use the word "invalid" with reference to both void and voidable marriages. If the validity of a marriage is attacked in an English court, the proper law governing the particular ground of invalidity must be selected in accordance with English conflict rules. Whether the marriage is either valid or void or voidable must be decided by the proper law, but this is a consequence of the application of the proper law, and the applicability of the proper law does not depend upon the distinction between "void" and "voidable",<sup>52</sup> and if by the proper law the marriage is voidable only but is still voidable by that law, the marriage is invalid within the scope of the English conflict rule in the sense that the case is one in which an English court, if it has jurisdiction, should annul the marriage.

It being clear that the formal validity of a marriage is governed by the *lex loci celebrationis*, it remains to discuss the question of the proper law relating to intrinsic validity ("validity" and "invalidity" being used in the sense already indicated so as to include a voidable as well as a void marriage within the expression "invalid" marriage). The selection of the proper law must depend upon the particular ground of alleged intrinsic invalidity,<sup>53</sup> and, as a general rule, the proper law would seem to be the law of the pre-marital domicile of the parties. Apart from the English statutory ground of the wilful refusal of a party to consummate the marriage, to be separately discussed, the grounds of alleged intrinsic invalidity are grounds that exist at the time of the marriage, even though they sometimes may not be discovered or discoverable until afterwards. A prohibition of a marriage within certain degrees of consanguinity or affinity has in the modern English cases been charac-

<sup>52</sup> Cf. Fleming, Choice of Law in Nullity Proceedings (1948), 11 Mod. L. Rev. 98, at p. 101; *contra*, Cheshire, Private International Law (3rd ed. 1947) 458.

<sup>53</sup> My earlier discussion of the proper law relating to different grounds of invalidity is to be found in my Essays on the Conflict of Laws (1947) 625, 626, 634, 681, 682.

terized as a matter of incapacity to marry, and it would seem to be clear that impotence, unsoundness of mind and non-age should be characterized as matters of incapacity, and that the proper law in all these cases should be the law of the pre-marital domicile of the parties. On the other hand wilful refusal to consummate a marriage under the Matrimonial Causes Act, 1937, in England, is obviously a ground of annulment that arises after the marriage and cannot by analogy or otherwise be characterized as a ground of original invalidity, notwithstanding the judicial suggestion that "wilful refusal to consummate a marriage, in order to be justified on principle as a ground for annulment and not dissolution, must be considered as a defect in marriage, an error in the quality of the respondent".<sup>54</sup> It would seem to be reasonable that the proper law might be, not the law of the pre-marital domicile, but the law of the domicile at the time of the refusal to consummate the marriage or at the time of the commencement of the proceedings.<sup>55</sup>

Returning now to the passage quoted above from Lord Greene's judgment in the *De Reneville* case, I venture with respect to suggest that his statement with regard to the law of the matrimonial domicile should not be accepted without further consideration. In the judgment itself, it is supported only on the slim foundation of a dictum of Lord Campbell L.C. in *Brook v. Brook*,<sup>56</sup> a case of a marriage within the prohibited degrees of consanguinity and affinity. Cases of this class have in later decisions been treated as cases of incapacity to marry, governed by the law of the pre-marital domicile of each party,<sup>57</sup> and Lord Greene's statement seems to involve the proposition that a party who is incapable of marrying by the law of his or her domicile at the time of the marriage can confer capacity upon himself or herself by reference to the law of a new domicile, described by Cheshire<sup>58</sup> as the law of the place where the parties intend to establish their matrimonial home, and by Cook<sup>59</sup> as the law of the intended family domicile. It must of course be admitted that the view vigorously advanced by these two writers in favour of the law of the matrimonial domicile

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<sup>54</sup> *Robert v. Robert*, [1947] P. 164, at p. 167, Jones J.

<sup>55</sup> *Contra*, Fleming (1948), 11 Mod. L. Rev. 98, at pp. 100, 101.

<sup>56</sup> (1861), 9 H.L.C. 193, at p. 207.

<sup>57</sup> This seems to be the result of *In re Paine*, [1940] Ch. 46, although the reasons for judgment are inexcusably inadequate, in their omission to discuss the earlier cases; cf. full discussion in my *Essays on the Conflict of Laws* (1947) 634-643.

<sup>58</sup> *Private International Law* (3rd ed. 1947) 269.

<sup>59</sup> *Logical and Legal Bases of the Conflict of Laws* (1942) 448.

has received substantial judicial support in the passage quoted above from Lord Greene's judgment.<sup>60</sup>

At the risk of repetition I venture to emphasize the importance of distinguishing between the three stages of the court's inquiry in a problem of the conflict of laws, namely, (1) the characterization of the question, (2) the selection of the proper law and (3) the application of the proper law,<sup>61</sup> merely noting here some aspects of this approach especially relating to the subject of the present § 3 of this article. In the first stage, the court must decide whether the question is one of formal validity, or one of intrinsic validity, of the marriage that is sought to be annulled. This question may be decided at once and without difficulty if the marriage is attacked solely on the ground of formal invalidity or failure to comply with imperative provisions of the *lex loci celebrationis*. The question of intrinsic validity being excluded by the precise and limited terms of the alleged ground of invalidity, the court must select the *lex loci celebrationis* as the proper law, and, if the provisions of that law are proved, must examine these provisions and decide whether the marriage is formally valid or formally invalid.

On the other hand, if the alleged ground of invalidity is not precisely limited to a question of formal validity, the task of characterizing the question is not so simple. The alleged ground of invalidity may fall within the borderland between formal validity and intrinsic validity, as, for example, if the validity of a marriage is attacked on the ground of lack of parental consent, and the marriage is celebrated in one country and the parties are domiciled in another. The *lex loci celebrationis* would be the proper law as to formalities, and if in that law a requirement of parental consent is a matter of formalities, the court must resort to that law on the question whether failure to comply with the requirement renders the marriage either void or voidable. The *lex domicilii* would be the proper law as to

<sup>60</sup> Cf. the judgment of Bucknill L.J. in the *De Reneville* case, [1948] P. 100, at p. 122: "To hold that the law of the country where each spouse is domiciled before marriage must decide as to the validity of the marriage in this case might lead to the deplorable result, if the laws happened to differ, that the marriage would be held valid in one country and void in the other country. For this reason I think it essential that the law of one country should prevail and that it is reasonable that the law of the country where the ceremony of marriage took place and where the parties intended to live together and where they in fact lived together [that is, France], should be regarded as the law which controls the validity of their marriage." Graveson, *op. cit.*, footnote 51, *supra*, at pp. 189 ff. discusses the dicta of Lord Greene and Bucknill L.J. and suggests that they constitute a starting-point for "new and welcome developments in the law".

<sup>61</sup> Fully discussed in my *Essays on the Conflict of Laws* (1947) chapters 3, 4, 5 and 6 and § 7 of chapter 8.

intrinsic validity, and if in that law a requirement of parental consent is a matter of capacity to marry or other aspect of intrinsic validity, the court must resort to that law on the question whether failure to comply with the requirement renders the marriage either void or voidable.<sup>62</sup> If the alleged ground of invalidity is impotence, prohibited degrees of consanguinity or affinity, or other ground of intrinsic validity, the court must of course select the proper law in accordance with the conflict rules of the law of the forum.

In any event, the court having characterized the question and selected the proper law, must examine the provisions of the proper law (if in the case of a foreign law those provisions are proved), and the question whether the marriage is either void or voidable will depend on those provisions. For example, if the ground of invalidity is that the parties are within the prohibited degrees of consanguinity or affinity, and the proper law is either English law or the law of Ontario or the law of any of the western provinces of Canada, or any other law that includes the provisions of Lord Lyndhurst's Act (1835), the marriage is void *ab initio*, whereas if the proper law is a law similar to the old canon law unmodified by statute, the marriage is merely voidable. Again, for example, if the ground of invalidity is the impotence of a party, the question whether the marriage is void or voidable will depend on the proper law, and if the proper law is English law, or some other law which (as is likely to be the case) is a law based on the old canon law unmodified by statute, the marriage is voidable, not void *ab initio*. Again, the ground of invalidity may be one that is unknown to the domestic law of the forum, and the question whether the marriage is void or voidable will depend on the provisions of the proper law.

The clearest example of an intrinsically invalid marriage has not yet been mentioned, namely, a "marriage" between two persons one of whom is at the time of its celebration the husband or the wife of a living third person.<sup>63</sup> Such a marriage is commonly called a "bigamous" marriage, but the invalidity of the marriage of course does not depend on the question

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<sup>62</sup> I have fully discussed this topic in my *Essays on the Conflict of Laws* (1947) 48 ff. (reproducing part of my article on Characterization in the *Conflict of Laws* (1937), 53 L.Q.R. 247).

<sup>63</sup> I am excluding from the discussion the case in which either the first or the second marriage of one of the parties to the second marriage is celebrated in a country by the law of which polygamy or polyandry is recognized or in which the second marriage is governed by the law of that country.

whether the already married party has or has not a defence to the criminal charge of bigamy. In a court which has jurisdiction to annul the "second" marriage, or in which the question of its validity has to be decided in connection with some other question, as, for example, a question of succession, within the jurisdiction of the court, it may be assumed that the court need not concern itself with a possible proper law relating to the second marriage under which that marriage may be either valid or merely voidable, and will be concerned only with the question whether at the time of the second marriage one of the parties is still married to a living third person, the second marriage being in that event void *ab initio*. The question before the court therefore is simply whether the prior marriage was originally valid, void *ab initio* or voidable, and, if valid or voidable, whether it has been dissolved or annulled by a competent court before the celebration of the second marriage. The court which adjudicates on the validity of the second marriage may thus be compelled to adjudicate on any imaginable question as to the validity of the prior marriage or as to the validity of its dissolution or annulment, involving of course, as regards the prior marriage, the use of the conflict rules of the law of the forum relating to the particular question.

#### JUSTICE IN NEW FRANCE

The members of the Courts of Justice were mostly natives of old France, and minded more their own affairs than the administration of justice. Their decisions were therefore not much respected; and indeed for success the parties generally depended more upon the favour of the protection of the great, than upon the goodness and justice of their cause.

Tho' the Governor General, the Bishop and the Intendant, were by their several Offices, Presidents of the Council, and that heretofore they used to be present at their deliberations; in latter times they never honor'd it with their presence, a circumstance that contributed much to the general disesteem, into which this part of the judicature had fallen. . . .

The Canadians mostly of a Norman Race; are, in general, of a litigious disposition; The many formalities in their procedures and the multiplicity of Instruments to be drawn up upon every occasion, seems to encourage this disposition — A short and well digested Code, by laying aside many of these, may in a great measure serve to correct it. (From Governor Murray's report on the state of the government of Quebec, June 5th, 1762)